UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

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In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

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United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

December 20, 2018

10:24 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: JUSTIN

HEARING re Motion to Compel / Motion of Omega Advisors Inc.

HEARING re Objection to Motion/ Claimant/creditors Objection to Bankruptcy Discharge and Proof of Claim (related document( s )924)

HEARING re Objection to Motion/ Letter (via email) dated 12/17/2018 to Judge Drain Objecting to Motion and Requesting Permission to Respond After Deadline (related document( s )924)

HEARING re Statement Joinder of Och-Ziff Capital Structure Arbitrage Master Fund, Ltd. to the Motion of Omega Advisors Inc. Pursuant to Sections 105 and 363 of the Bankruptcy Code to Enforce the Courts November 19, 2018 Sale Order Invalidate the Ultra Vires Sale and Lockup of Medium-Term Intercompany (related documents(s)

HEARING re Motion for Relief from Stay : Notice of Motion and Motion of Community Unit School District 300 for Relief From the Automatic Stay or, in the Alternative, for Abstention

HEARING re Response to Motion Sante Marcoccias Response in Opposition to Motion of Debtors for Entry of an Order Extending the Automatic Stay to Certain Non-Debtor Parties (related document(s)924)

HEARING re Notice of Proposed Order/ Notice of Filing of Revised Proposed Order In Connection With, and Declarations In Support of, Application of GA Capital for Allowance and Payment of Fees and Expenses Pursuant to Bankruptcy Code Sections 503(b)(3)(D) and 503(b)(4) (related document(s)l102)

HEARING re Motion for Payment of Administrative Expenses / Application of GA Capital for Allowance and Payment of Fees and Expenses Pursuant to Bankruptcy Code Sections 503(b)(3)(D) and 503(b)(4).

HEARING re Motion to Shorten Time/ Motion of GA Capital for Order Shortening Notice Period With Respect to Application of GA Capital for Allowance and Payment of Fees and Expenses Pursuant to Bankruptcy Code Sections 503(b)(3)(D) and 503(b)(4) (related document(s)l 102)

HEARING re Motion to Allow/Motion Seeking Entry of and Order Allowing Administrative Expense Claim Pursuant to 11 U.S.C. Section 503(b)(9)

HEARING re Notice of Hearing on Motion for Relief from the Automatic Stay (related document(s)849)

HEARING re Motion for Relief from Stay

HEARING re Notice of Proposed Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief (related document(s)938)

HEARING re Motion to Approve : Motion of Debtors for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief

HEARING re Interim Junior DIP Order Signed on 11/30/2018 (1)Authorizing The Debtors to (A) Obtain Post-Petition Financing and (B) Granting Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying The Automatic Stay Scheduling Final Hearing to be held on 12/20/2018 at 10:00 AM at Courtroom 118, White Plains Courthouse (related document(s)872).

HEARING re Motion to Confirm Termination or Absence of Stay Motion for Order Declaring Automatic Stay Inapplicable to Non-Residential Real Property Lease

HEARING re Motion to Approve / Motion of Debtors for Entry of an Order (I) Approving Debtors Incentive and Retention Programs for Certain Key Employees and (II) Granting Related Relief

HEARING re Motion for Relief from Stay or, in the Alternative, for an Order Compelling Assumption or Rejection of an Executory Contract

HEARING re Notice of Hearing : Notice of (I) Withdrawal of Motion of Debtors to Shorten Notice with Respect to Motion of Debtors for Entry of an Order Authorizing Entry into Administration Agreement and (II) Hearing on Motion of Debtors for Entry of an Order Authorizing Entry into Administration Agreement (related document(s)870, 871)

HEARING re Motion to Extend Automatic Stay : Motion of Debtors for Entry of an Order Extending the Automatic Stay to Certain Non-Debtor Parties

HEARING re Objection to Motion / Limited Objection of Cross Country Home Services, Inc. to Debtors Motion for Entry of an Order Authorizing Entry into Administration Agreement (related document(s)870)

HEARING re Motion to Extend Deadline to File Schedules or Provide Required Information / Motion of Debtors for Entry of Order Further Extending Time to File Schedules of Assets and Liabilities, Statements of Financial Affairs, and Rule 2015.3 Financial Reports

HEARING re Notice of Hearing: Notice of Final Hearing on Debtors Motion for Authority to (A) Obtain Postpetition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Prepetition Secured Parties, and (D) Schedule Second Interim Hearing and Final Hearing (With Respect to Junior DIP Financing) (related document(s)7, 872)

HEARING re Notice of Agenda of Matters Scheduled for Hearing on December 20, 2018 at 10:00 a.m.

HEARING re Motion to Reject Lease or Executory Contract / Omnibus Motion of Debtors for Order Approving Rejection of Certain Executory Contracts

HEARING re Motion to Extend Time / Motion of Debtors for Entry of Order Enlarging Time Within Which to File Notices of Removal of Related Proceedings

HEARING re Notice of Hearing Motion for Relief from Stay (related document(s)383)

HEARING re Notice of Hearing

HEARING re Objection to Motion (related document(s)7)

HEARING re Notice of Motion to Set Hearing (related document(s)987)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Please be seated.

MR. FAIL: Good morning, Your Honor.

THE COURT: Good morning. In re Sears Holding Corp et. al.

MR. FAIL: Yes, Good morning, Your Honor. Garret Fail, Weil, Gotshal & Manges for the Debtors. Just begin by thanking Your Honor and its chambers for accommodating a busy calendar and a moving agenda for this morning's hearing.

THE COURT: Sure.

MR. FAIL: There are a number of uncontested matters and with the Court's permission we'll take number two on the agenda first which is the Debtors' motion for entry of an order authorizing entry into an administration agreement.

Your Honor may recall we filed this motion prior to thanksgiving -- prior to the bankruptcy as the Debtors' offered their customers an opportunity to purchase protection agreements or extended warranties under policies and programs that were underwritten by the Debtors. Subsequent to the filing, the Debtors stopped selling those in the majority of their locations and platforms and looked to replete what was a stable source of liquidity and revenue both as a stand-alone product but also attending to the home

services business end and other products that sold including home appliances.

So the Debtors worked, as was announced at a prior hearing, to negotiate an agreement and subsequently did enter into the agreement that was filed with Assurant Services Protection, Inc., Federal Warranty Service Corporation, and United Service Protection, Inc. Your Honor, the Debtors believed it was an ordinary course transaction.

There were no objections other than one limited objection that was filed by Cross Country. That objection was withdrawn this morning. As was noted in the motion and set forth in the Assurant Agreement, there was a carve out for existing obligations from the exclusive arrangement that was reached with Assurant.

The Debtors and Assurant have entered into a modification of the language to make it more clear. Both Assurant, the Debtors, and CCHS have agreed on that language. And accordingly CCHS has withdrawn its objection.

THE COURT: Okay. Have I seen that language?

MR. FAIL: Your Honor --

THE COURT: I saw the language that the objector proposed, but I don't think I've seen the --

MR. FAIL: Right --

THE COURT: -- final language.

MR. FAIL: -- Your Honor, and they've withdrawn their objection, so the order would not be amended from the one that was proposed. I can submit --

THE COURT: So this is just the agreement?

MR. FAIL: The agreement was amended.

THE COURT: All right.

MR. FAIL: It's a third amendment, Your Honor, for disclosure. The first amendment extended the drop-dead date. Your Honor may recall there was an earlier drop-dead date. The second amended, a pricing term. And the third fixed the exclusivity.

THE COURT: So this is an agreement by Assurant and the Debtors that acknowledges the rights that the --

MR. FAIL: Cross Country.

THE COURT: -- Cross Country has under its agreement?

MR. FAIL: Well, Cross Country's agreement is an executory contract that hasn't been assumed yet.

THE COURT: Right.

MR. FAIL: But it is clear from -- we thought it was clear before -- it's even more clear now that the Cross Country agreement would not cause a default or violate the Assurant agreement.

THE COURT: Okay. That's the nature of the language.

MR. FAIL: Yes.

THE COURT: I just didn't want to create additional rights for Cross Country.

MR. FAIL: Neither did we, Your Honor.

THE COURT: Okay. Based on that record, does anyone have anything to say on this motion? All right. I'll grant the motion, which is now unopposed and is supported by good business reasons as laid out in the motion and further the objection has been resolved on terms that simply acknowledge -- as I understand it -- the existing agreement under -- including under the third amendment with --

MR. FAIL: One clarification, Your Honor. It's not that the third amendment of CCHS. That one that they referenced in their objection has not been signed.

THE COURT: That has not been signed.

MR. FAIL: There's a third amendment to the Assurant agreement.

THE COURT: All right. This is the third amendment to the Assurant agreement?

MR. FAIL: Right.

THE COURT: But it -- this just acknowledges the Cross Country Home Services, Inc. agreement and says that the Assurant agreement -- the existence of that agreement doesn't breach the Assurant agreement?

MR. FAIL: Correct.

THE COURT: Okay. All right. So I will grant that motion and you can email that order to chambers.

MR. FAIL: Thank you very much. I'll turn the podium over to Mr. Singh for the next items on the agenda.

THE COURT: Okay.

MR. SINGH: Good morning, Your Honor. Sunny Singh, Well, Gotshal on behalf of the Debtors.

THE COURT: Good morning.

MR. SINGH: Your Honor, the next item on the agenda is the cash management motion at ECF 5, Your Honor. We do have an interim order that was entered and as we announced at the last hearing in connection with the DIP, we were going to work together with the parties to make some modifications to the interim order for cash management that sort of incorporate the understanding of the parties.

THE COURT: Right.

MR. SINGH: So, Your Honor, we have done that. I do have a revised form of order that we literally just finalized this morning before the start of the hearing. I can hand up a copy of the redline, Your Honor, if I may approach.

THE COURT: Okay. That's fine.

MR. SINGH: So, Your Honor, just working through the order. As we said in the DIP and the DIP order covers,

any transfers between Debtors on a post-petition basis are now secured and they have the priorities as set forth in the DIP order.

Here, what we've done is really try to deal with transfers by Debtors to non-Debtor affiliates. And that includes foreign affiliates as well as domestic affiliates.

Your Honor, so in Paragraph 6 is really where the changes are, and we've made clear here that transfers by Debtors to non-Debtor foreign affiliates shall not exceed $1 million per month or need to be budgeted in a budget for a foreign Debtor -- foreign non-Debtor affiliates that we are finalizing with the parties.

So there will be a budget and if it's a budgeted expense that people have signed off on, we can do it, otherwise, it will not exceed $1 million without notice to-- without notice to the Creditors' Committees and the DIP lenders.

And Your Honor, with respect to Debtor affiliates this is at the bottom of Page 6 -- excuse me, domestic affiliates -- I apologize, Your Honor. The Debtors cannot transfer to domestic affiliates and its domestic non-Debtor affiliates in excess of $1 million per week or $5 million in the aggregate to all non-Debtor domestic affiliates for the case without giving notice to the Creditors' Committees and the DIP lenders.

THE COURT: Okay.

MR. SINGH: And, Your Honor, and the loans are going to be secured and they're going to be pursuant to promissory notes and inter-company notes that we are finalizing, and it contemplates that the parties will continue to finalize the notes and they have to be reasonably acceptable. And we'll make commercially reasonable efforts to record, et cetera when it makes sense to do so. Particularly with respect to foreign jurisdiction. In some cases, it may not.

THE COURT: Okay.

MR. SINGH: So we'll continue to work that out. And Judge, just one thing I would note, the numbers in the--

THE COURT: Well, could I -- and then --

MR. SINGH: Yeah.

THE COURT: -- Paragraph 9 -- new Paragraph 9 syncs this order up with the DIP orders.

MR. SINGH: Exactly. This is --

THE COURT: Okay. Including the junior DIP order.

MR. SINGH: Exactly, Your Honor. This deals with --

THE COURT: Okay.

MR. SINGH: -- intercompany Debtor to Debtor transfers --

THE COURT: And their rights --

MR. SINGH: -- on a post-petition basis.

THE COURT: -- vis-à-vis other liens?

MR. SINGH: Exactly.

THE COURT: Okay.

MR. SINGH: Exactly. So we just incorporated by reference so as to not restate anything here.

Your Honor, we've also agreed to reporting in Paragraph 10 and maintaining intercompany transaction records. So we'll continue to comply with that.

Judge, just one change. If you see Paragraph 11 that we literally just -- I just wrote in as we were -- as Your Honor was taking the bench. This deals with Sears Re and we -- if Your Honor recalls, we are not making any cash payments to Sears Re, continuing not to do so. But we are honoring warranty payments as part of the business.

And so this just makes clear that if the warranty payments or any cash transfers need to be made to Sears Re we'll have to get the consent of the parties to do so. Currently, the way the warranty payments are honored are it's a set off against the company's net receivable -- against the Debtors' net receivables.

We're not sending cash, but we are maintaining books and records and reducing the amount that's due to the Debtors.

THE COURT: So that's not in my Paragraph 11. You

wrote that in?

MR. SINGH: Yes, that's words that I just -- that I just -- so Your Honor, the change would be the “Debtors are authorizing the power to pay and honor any amounts due with respect to warranty payments provided that nothing herein shall authorize the Debtors to make any cash transfers to Sears Re Insurance Company” --

THE COURT: You struck the word other?

MR. SINGH: Exactly.

THE COURT: Right. Okay.

MR. SINGH: “Without the consent of the Creditors’ Committee or the DIP agents.”

THE COURT: Okay.

MR. SINGH: So that's the change and we will submit a revised order.

THE COURT: That's fine.

MR. SINGH: Your Honor, I think that's it. unless there's any questions you have or anything else.

THE COURT: I mean, I think this did address the issues that the committee had raised in its supplemental filing. And I shared -- I wanted to make sure that the DIP agreements aligned themselves with this order, which now they do. So I am comfortable with these changes. And in the light of there being no continuing opposition to the entry of this order -- the cash management order -- I'll

grant the motion on a final basis --

MR. SINGH: Thank you, Your Honor.

THE COURT: -- on these terms as laid out on the record today and in this black line.

MR. SINGH: Okay. Thank you, Judge. We will submit a revised order to chambers.

THE COURT: Okay.

MR. SINGH: Your Honor, if I could just -- we have resolved one of the matters that was contested for this morning's agenda. We resolved it just before the hearing. If I could take that matter up now.

THE COURT: Okay.

MR. SINGH: that is the motion by Great American for substantial contribution. And the parties have resolved it and if I can read the resolution -- Your Honor, recite the resolution. So basically the parties have agreed that Great American will have a substantial contribution claim for $1.25 million all-in for all of the professional's costs, expenses that they have asserted in connection with the junior DIP financing.

The Parties will exchange, the Debtors and Great American, will exchange full releases of anything associated with the junior DIP. You know, they have other claims. We're not dealing with anything there. Of course, they have pre-petition claims.

And just one point, Your Honor, the UCC just in terms of how we would do this from a timing perspective, Mr. Dublin needs to go back obviously to the UCC to make sure they're okay with this, so what we would propose is to adjourn the matter to the next hearing date in January. But we believe we'll be able to submit an order probably tomorrow or the day after.

THE COURT: Well, I think you should do it by notice of presentment.

MR. SINGH: Okay.

THE COURT: You know, the law firm time records weren't submitted until after the company had objected. And I'm not saying that this isn't necessarily a fair settlement, I just think people should have a little more notice of it.

MR. SINGH: Certainly, Your Honor. So we'll file a revised order and notice of presentment with the Court.

THE COURT: Okay.

MR. SINGH: Okay. And I think that -- so that will resolve --

MR. TENZER: Good morning, Your Honor. Andrew Tenzer of Paul Hastings on behalf of Great American Capital.

Debtors' counsel has described accurately a resolution that we have reached, and we will obviously work out the language of the order with the Debtors and

Creditors' Committee and submit it to the Court on notice of presentment.

THE COURT: Okay. that's fine. I mean, I obviously had prepared for this because I didn't know that you all had just recently settled it and had come to the preliminary conclusion that that some administrative expense was warranted. At least in respect of documenting the final documents, which as Mr. Tenzer's paper said, the DIP lender that ultimately was chosen, stepped into.

But, you know, again, it's not clear to me how far beyond that a settlement would go. Obviously, there are litigation costs, et cetera. So I just think it should be noticed.

MR. TENZER: Thank you, Your Honor.

THE COURT: Okay.

MR. SINGH: Thank you, Your Honor. I think we -- I can turn it over to Candace Arthur to handle the next matter.

THE COURT: Okay.

MS. ARTHUR: Good morning, Your Honor. For the record, Candace Arthur, Weil, Gotshal & Manges on behalf of Sears Holdings Corporation and its affiliated Debtors.

Your Honor, the item on the agenda that I will be handling is the Debtors' motion to sell 13 parcels of non-residential real property and assign five unexpired leases

to AMERCO Real Estate Company. Your Honor may note that in the motion we did list that there are going to be six unexpired leases that will be subject to the purchase agreement. One of the leases expired in connection with the lessee's bankruptcy that was pending in Illinois pursuant to the termination of D65 D4 deadlines. So only five will be going forward --

THE COURT: Okay.

MS. ARTHUR: -- in terms of the assignment.

The motion was filed in November 29th and is reflected on the docket as ECF number 938. In support of the motion, the Debtors also filed a declaration of Roger Puerto, their head of real estate transactions. Mr. Puerto is in the court room this morning. The declaration is reflected on the docket at ECF number 1053.

The Debtors also filed a revised proposed order yesterday afternoon, Your Honor, reflecting comments received from the Creditors' Committee, the ABL DIP lenders, Cardtronics USA, Inc., and other parties and interests. The revised proposed order is reflected in the docket at ECF number 1350. With the Court's indulgence, I can provide some high-level points as to the transaction.

The Debtors engaged in a robust marketing effort in connection with monetizing these assets. They started from early 2018 and in at least with respect to one of the

properties, they've been marketing it since 2014. None of the assets are material to the Debtors' ongoing operations or revenue generating capacity.

And ultimately, Your Honor, the purchase price offered by AMERCO is in the aggregate higher or better than any other offers received for the assets. The value allocated to the majority of the assets is higher than the appraised value of the applicable asset. And the Debtors did engage in several months of arm's length negotiations with AMERCO.

We submit that proceeding with the sale as set forth in the purchase agreement is in the best interest of the Debtors' estates and creditors and a sound exercise of their business judgment.

I do want to note for Your Honor that consummating the transaction will generate proceeds for the benefit of the Debtors' creditors and estates. Specifically, two of the parcels are unencumbered and will generate approximately $7.2 million towards the wind down account. Seven of the thirteen parcels being sold for a total amount of approximately $32 million are collateral securing the Cascade loan. The remaining four parcels that are being sold for a total of over $5.23 million are non-Debtor collateral securing the REMIC loan.

The liens of the respective creditors will attach

to the sale proceeds. So Your Honor no party objected to the sale of the assets pursuant to the terms of the purchase agreement. The sale itself is uncontested.

However, as you may note, or to the extent you had a chance to review this morning, SL Agent LLC, the agent under the Cascade loan, did file a limited objection to the motion. And they're requesting that the Debtors either use the proceeds from the sale of the Cascade properties to pay down Note A which is -- has approximately $100 million outstanding or the Court order the Debtors to segregate the sale proceeds pending further order.

The Debtors believe that the relief that the Cascade agent is requesting would in fact create a slippery slope that will render administering these Chapter 11 cases unmanageable and have very detrimental effects on the estates. As an initial matter, the Cascade loan is bifurcated into two notes. Note A is a first out tranche and there's approximately $720 million outstanding under Note B which is held by JPP.

Counsel for JPP has confirmed that they have no issue with the Debtors selling $30 million of the collateral placing a lien on the proceeds of the sale and putting the proceeds of the sale under cash management system for use during the pendency of these Chapter 11 cases.

I'm only highlighting, Your Honor, the position of

the holders of Note B because it would mean that the Cascade agent is in fact arguing, surprising to the Debtors, that the holders of Note A are not adequately protected. First, Your Honor, the holders of Note A are over secured. There's a significant equity cushion. After the sale --

THE COURT: Okay. can I interrupt you?

MS. ARTHUR: Yes.

THE COURT: It's cash collateral, though, right?

MS. ARTHUR: Pardon, Your Honor?

THE COURT: It's cash collateral?

MS. ARTHUR: Yes, Your Honor.

THE COURT: So you either need to get their consent or make a motion for its use. So I think that until I granted such a motion, or you've gotten their consent, you should hold the money.

MS. ARTHUR: Your Honor, the Debtors believe that in connection with its -- particularly with the junior interim DIP order that the protections that the Cascade agent wanted in connection with the use of cash collateral--

THE COURT: It's just there's no motion in front of me. You can make it on an expedited basis. But they have a right to look at what you're offering and say, you know, we're still not adequately protected.

MS. ARTHUR: That's fine, Your Honor. We'll make a motion.

THE COURT: Yeah. And again, I can -- I mean, if you -- if the companies -- the company needs the money before the next interim -- the next omnibus hearing, you can make a motion on shortened notice under the, you know, the bankruptcy rules for an expedited determination of that.

MS. ARTHUR: Okay. I -- Your Honor, I'm happy to comply with that. And we will do so. To the extent you have any further questions --

THE COURT: No, I don't. I looked at Mr. Puerto's declaration. I assume because this is the only -- you resolved the other one. You resolved the --

MS. ARTHUR: Cardtronics.

THE COURT: -- Cardtronics objection. So I think this objection is resolved by what we just said. DSL agent objection. And let me just, for the record, does anyone want to cross-examine Mr. Puerto on his declaration?

THE COURT: Okay. I'll grant the motion then with the liens to attach to the sale proceeds.

MS. ARTHUR: Thank you, Your Honor. So with respect to the Cascade -- the proceeds for that --

THE COURT: Well, maybe there are people who want to --

MS. ARTHUR: -- we'll set it aside.

THE COURT: -- I didn't realize there were people who wanted to speak who are standing behind you.

MR. OSTROW: Good morning, Your Honor. Steven Ostrow, White and Williams. I'm counsel for the purchaser, AMERCO Real Estate Company.

THE COURT: Right.

MR. OSTROW: I didn't realize that counsel for the Debtors was going to indicate that one of the leases that had been rejected in the tenant's bankruptcy was going to be removed from the sale. We would -- we still want that lease signed -- assigned to us even though we recognize that it's been rejected by the -- by that tenant party.

THE COURT: So the Debtors -- to the extent -- I guess what you -- I mean, I don't want to put words in your mouth. But let me suggest this. Is it what you're saying which is that to the extent that the Debtors have any rights in that lease that's being assigned?

MR. OSTROW: correct.

THE COURT: That's fine, right?

MR. OSTROW: Yes.

MS. ARTHUR: Absolutely, Your Honor.

THE COURT: okay.

MR. OSTROW: Thank you, Your Honor.

THE COURT: That's fine. I imagine that the Debtor you're talking about or the trustee would be happy to go along with that. But --

MR. OSTROW: They won't be significant, but

whatever they are --

THE COURT: Right.

MR. OSTROW: -- it gives us some control over that portion of the property.

THE COURT: Sure. Okay.

MS. CHI TO: Good morning, Your Honor.

THE COURT: Good morning.

MS. CHI TO: My Chi To of Debevoise & Plimpton on behalf of SL Agent LLC. We thank you for your ruling this morning and obviously agree with it and we'll look forward to working out the revised form of order reflecting it with --

THE COURT: Well, I don't think there -- nothing needs to be -- I don't think anything needs to be revised. Were liens attached to the proceeds in the, you know, in the same amount priority extent et cetera that they existed at the closing. And then it's cash collateral. So then 363 and 362 govern.

MS. CHI TO: Your Honor, the revised form of order that was submitted yesterday had paragraphs that proposed that all the proceeds of the sale be used in accordance with the budget. And therefore we would need --

THE COURT: Okay. well, that would have to be changed.

MS. CHI TO: Yes. That's what I meant.

THE COURT: Okay.

MS. CHI TO: Thank you, Your Honor.

THE COURT: With respect to your collateral. Because I assume everyone else has consented?

MS. CHI TO: That's right.

THE COURT: Okay.

MS. CHI TO: Thank you.

MR. O'NEAL: Your Honor, Sean O'Neal on behalf of JPP, Cleary Gotlieb.

I just wanted to clarify, I think the statement was made that the -- that JPP as a lender holding the Note B does not have any issue with the motion or with the relief requested. I would just clarify that we have no objection to it.

THE COURT: Okay. All right. Well, --

MR. O'NEAL: We actually have -- we've --

THE COURT: That's more precise, I suppose, so --

MR. O'NEAL: Yes, it is, Your Honor.

THE COURT: Okay. All right. But that includes the order's provision for using the cash?

MR. O'NEAL: Your Honor, under our inter-creditor agreement, the Note A holder, the agent, has all kind of bankruptcy related rights so that's why I made the statement.

THE COURT: I see. Okay.

MS. ARTHUR: Okay, Your Honor. In that case I will move to the next item on the agenda. I'm going to introduce Mr. Susheel Kirpalani.

THE COURT: Okay. I was wondering if we could put this towards the end.

MS. ARTHUR: We can do that.

THE COURT: I think this will take more time unless someone is time pressed?

MS. HWANGPO: That would be me, Your Honor.

THE COURT: You are time pressed?

MS. HWANGPO: Yes. (indiscernible)

THE COURT: All right. So maybe we could move --

MS. ARTHUR: We can move the item, Your Honor --

THE COURT: Yeah.

MS. ARTHUR: -- to the extent you prefer to the interim -- to the junior DIP order. And to that extent I'll cede the podium to my colleague, Natasha Hwangpo.

THE COURT: Okay.

MS. HWANGPO: Your Honor, for the record, Natasha Hwangpo, Weil, Gotshal & Manges for the Debtors. Moving on to agenda number five which I believe is the Debtors' junior DIP motion.

The junior DIP motion seeks approval of the $350 million junior DIP facility on a final basis. Your Honor, we believe it is imperative that the Debtors get final

relief at this juncture and as Your Honor may remember, the junior DIP is the product of rigorous negotiations which took place all the way to the court house lobby on the morning of the interim junior DIP hearing. And ultimately culminated in a global settlement with the junior -- or excuse me -- the Debtors' key stake holders, including their Creditors' Committee.

In light of such a global settlement, the Debtors have received no informal objections, and four formal objections. They were filed by the second lien indenture trustee, Mien Co, Luxottica and the Texas Taxing Authorities. The Debtors filed an omnibus reply at docket number 1297 responding to all formal objections. And as noted in the reply, we've resolved the Texas Taxing Authorities objection. And they will be seeking clearer language and sales order as necessary.

THE COURT: Okay.

MS. HWANGPO: This leaves three remaining objections, which again, as stated in the reply, the Debtors believe should be overruled and the motion granted on a final basis.

But, Your Honor, I did want to note that the Debtors also filed a final junior DIP order as Exhibit A to the reply and a redline against the interim junior DIP order as Exhibit B.

THE COURT: And that's the redline in the binder, correct?

MS. HWANGPO: That's correct, Your Honor.

THE COURT: Okay. so I've reviewed that.

MS. HWANGPO: And those changes are really just to reflect changes that need to be made as a final order.

THE COURT: Right.

MS. HWANGPO: And the only substantive change was the removal of the Luxottica language in Paragraph 66 as they are objecting to the DIP.

THE COURT: But you're happy to put it back in?

MS. HWANGPO: Should we come to a resolution.

THE COURT: Okay.

MS. HWANGPO: Unless Your Honor has any questions, I'm happy to cede the podium to anyone who would like to be heard.

THE COURT: Okay. Well, why don't we take the lien agent first.

MR. FOX: Good morning, Your Honor. Edward Fox from Seyfarth Shaw on behalf of Wilmington Trust National Association, as indenture trustee and collateral agent for the senior secured notes due to six and five-eighths percent senior secured notes due 2018.

Your Honor, I think I can make this brief. I noticed that after the Great American motion for approval of

their fees, the Great American representative has left.

THE COURT: They left.

MR. FOX: I assume that means that they have no further interest in pursuing the junior DIP which would make moot the issues that we raised at this point. And so on that basis, I think we can just withdraw the objection.

THE COURT: that's fine. The record will reflect that. Anyone here from the Texas ad valorem taxing jurisdictions? Then I'll take counsel's representation that that matter's been resolved. And that leaves -- I don't know if you pronounce it Mean Co or Me-an Co.

MR. SARACHEK: Yes. Mean.

THE COURT: Am I --

MR. SARACHEK: I know.

THE COURT: Maybe they want to change it to Me-an.

(Laughter in the Courtroom)

MR. SARACHEK: Good morning, Your Honor. Joe Sarachek on behalf of Mean. Your Honor, thank you.

THE COURT: Good morning.

MR. SARACHEK: Your Honor -- Thank you. And Happy Holidays. Your Honor, Mean is a trade vendor. They are an administrative claim holder. And internally, they believe that their analysts have looked at what they think the shipments that Sears received in the month prior -- and more specifically, in the 20 days prior to the bankruptcy filing

-- and that number could be something like $350 million. For Your Honor's, you know, information, there have already been about $35 million of administrative claims that have traded. And the issue really is this is costing significant --

THE COURT: Is that based on filings under the bankruptcy rules?

MR. SARACHEK: Based on 3001 filings.

THE COURT: Okay.

MR. SARACHEK: The issue really is is that the $240 million in the wind down account -- and I've communicated with Sears' counsel, I showed up at the 341 meeting, and it's not just Mean. There are many other administrative creditors who are really, really suffering, Your Honor. When I say really suffering, the issue is Mean is owed a total of $4 million, they have about $484,000 and we're just simply asking --

THE COURT: I'm sorry. Which is it? $4 million or 480 --

MR. SARACHEK: No, no. They're owed a total -- I'm sorry. Let me be specific. They're owed $484,000 in the 20-day period --

THE COURT: Okay.

MR. SARACHEK: -- prior to.

THE COURT: Right.

MR. SARACHEK: Their total claim is $4 million. This is a small business. And basically, they don't want to sell their claim. They're still supplying Sears. But they need -- they have lenders, they have vendors. And believe it or not, China isn't as like kind as the U.S. when it comes to your obligations. They're getting -- and the Debtors are aware -- I've spoken to Mr. Fail about this -- they're getting serious threats from their vendors about their ability to repay.

Obviously, they understand the $4 million -- the unsecured claims is the lowest priority -- but with respect to the 503(b)(9), that obviously has a higher priority.

They can't afford to sell this at 60 cents on the dollar which is where the market is today. The issue really is that Sears needs to come clean and say, look, we know we got $350 million. This isn't a hard exercise. We know we got $350 million -- $200 million -- whatever the number is within the 20-day period and we are administratively solvent or we're not administratively solvent. And by doing that -- by doing that, Your Honor, it will greatly, greatly help the existing vendors.

Mean is an existing vendor. They are providing goods. This is putting a lot of pressure, not just on Mean. I also represent an organization, Helen Andrews, putting a lot of pressure on these vendors. And what we're asking

for, Your Honor, is for Sears to provide the information, provide some assurances that $240 million in the wind-down account, because here's their response, Sears' response, and I'll let them speak, of course. But their response is, well, we think that should be adequate. Well, no attorney would ever operate, "Well, maybe my fees are going to get paid; maybe they're not." No attorney would every operate that way. Why should the vendors operate that way?

THE COURT: I come across many who operate that way.

(Laughter in the Courtroom)

MR. SARACHEK: That's not a good way to operate.

THE COURT: Well, I mean it's a business model for people that represent small and medium-size Debtors, so ... But I'm going across -- off the point. But I want to bring you back to the point -- I understand your clients concern. But I don't see how it ties into this particular motion.

MR. SARACHEK: Because what hap -- what -- in this motion there is a $240 million wind-down account that's referenced. And if that is inadequate, if that wind-down account is inadequate, that kind of implies -- not kind of, that implies that Sears is administratively insolvent.

We are on the back of another case, which I'm sure you're familiar with, Toys R Us, where vendors, administrative claim vendors, recently have paid 15.5

percent of their post-petition claims. So, just bringing this back, that 350 either is adequate or it's not adequate. And the 240 that's part of the 350 is either adequate or it's not. And we're simply asking for there to be a process that discloses what the 20-day shipments were.

THE COURT: Again, every piece of information I have from the prior hearing on this, as well as the motion papers, makes it pretty clear that they need the money now.

MR. SARACHEK: We agree.

THE COURT: And that it does take the Debtors through the sale process that has also been set up by orders that I've entered, to either sell a substantial or all of their remaining businesses as a going concern, or substantially, all of it is part of one liquidation sale or piecemeal sales.

And I guess while I -- again, I think I fully appreciate your client's concerned and I think that it should be addressed in some way. I don't think it necessarily, or properly applies to this particular determination I'm being asked to make today.

I mean, I assume that the Debtors will be establishing a bar date for admin claims that include 503(b)(9) claims, or bar date for all claims, and that that will be done promptly. And claimants themselves have their rights to file claims, separate and apart from that.

MR. SARACHEK: They have filed the claims and there is a motion right now from one claimant to compel, but Your Honor, can I suggest something?

THE COURT: And I assume the Debtors' response to that motion will be we want to do this in an orderly fashion and we're going to set up procedures so that it can -- I mean, so that Debtors have done in countless other retail cases, to deal with those types of claims.

MR. SARACHEK: Can I make a suggestion, Your Honor, which is, what if, in connection with this junior DIP financing, there was an affidavit that basically said this is the amount we got within the 20 days and the $240 million is sufficient to cover that.

THE COURT: Well, I'll think about that.

MR. SARACHEK: Thank you.

THE COURT: Okay. Let's address that one first and then I'll hear the Luxottica.

MS. HWANGPO: Your Honor, as you stated, we do believe that this is not the right time to be dealing with Mean Co's objection. I don't think it's related to the DIP.

But we did want to state for the record that at the 341 meeting, the Debtors did say that the Debtors did state that they are administratively solvent and that we'd continue to pay our administrative expenses as they come due.

Also, the Debtors will be filing their SOFAs and statements, set up a bar date and they do intend to create an orderly process in which claims, including the 503(b)(9) claims will be settled or reconciled.

THE COURT: Okay. I think you should do that promptly.

MS. HWANGPO: We will, Your Honor.

THE COURT: Either a separate 503(b)(9) procedures motion or including it within a bar date. You don't necessarily have to do the bar date right away, but I think it is important to get a grip on the 503(b)(9) claims because people will start asserting them and generally the response to that focus is on an orderly way to deal with them so that no one is unduly rewarded for coming first or unduly prejudiced for not coming first.

MS. HWANGPO: Understood, Your Honor. (indiscernible)

THE COURT: Okay.

MR. ALLERDING: Good morning, Your Honor. John Allerding on behalf of Thompson Hine on behalf of Luxottica Retail North America Inc.

As Your Honor knows, we are here on our objection to the junior DIP motion. We do not want to stand in the way of this financing, but we cannot continue to sit back while the Debtors engage in post-petition conversion of

Luxottica's funds.

Your Honor, this is, our objection, is closely tied into the issues we raised in our motion for relief from stay and our motion to compel assumption or rejection, both of which are also before the Court today.

Your Honor, these are funds generated by Luxottica's sale of Luxottica's goods and Luxottica's services. Sears has no right or title to these funds other than a small portion which is considered a company fee.

The license agreement specifically states that the company and licensee agree and intend for the funds reflected in the cash, checks and credit sales documents minus a company fee to be held by the company for the benefit of and in trust for licensee and that title to such a fund shall not pass to the company.

Your Honor, there is no dispute that these assets or these funds are held in trust.

THE COURT: I think there is a dispute, isn't there?

MAN 2: Yes, Your Honor, there is.

MR. ALLERDING: Your Honor, my understanding was that there isn’t a dispute that the funds are held in trust, it’s a dispute of whether or not the holding the funds in trust requires segregation and requires the Debtors to avoid co-mingling. That was my understanding of the Debtors’

position. Your Honor, Luxottica's motion does not --

THE COURT: But aren't -- don't those tie into each other? I mean, in one paragraph of the agreement -- in the same paragraph, actually, 9.3., there's a whole mechanism for using, making the payments to Sears, Sears Roebuck and Company, and using he Sears POS terminals, and no mention of any segregation.

MR. ALLERDING: Understood, Your Honor --

THE COURT: And then there's the amendment, which you quoted. But the amendment doesn't really specify how the funds are to be dealt with. So, look, this is a summary proceeding. I'm not prepared or authorized to determine, in that context, whether this is -- this arrangement, which may include the party's course of dealing with each other too, which I have no evidence on, is one that creates and maintains a trust, or not. And that's something that needs to be decided in a proper procedural context. That's what the Second Circuit said in Orion Pictures and I said in A&P and Judge Chapman said in Sabine.

So, I think what we're dealing with here is something that's more narrow, which is preserving, to the extent they exist, Luxottica's rights under the agreement. And your point, of course, is that if we continue the procedure that Sears is proposing, which is to continue the comingling, now that you've raised the issue, your rights

actually may be prejudiced because, at least on a go-forward basis, since you've raised the issue -- and I don't know when you first raised the issue. I mean that's a factual, but you've clearly raised it in this case. So, there needs to be some way to protect those rights at this point.

MR. ALLERDING: That is correct, Your Honor, and--

THE COURT: Without determining what they are. And you're saying that co-mingling doesn't necessarily do that.

MR. ALLERDING: Correct, Your Honor. At the last -- at the senior DIP financing hearing, Your Honor made very clear that the Debtors cannot grant a lien on property that is not estate property, and we agree. The problem is, by co-mingling these funds, they're engaging in conversion, which is arguably subjecting --

THE COURT: Well, maybe. Well, that's not really the issue, I think. The issue is whether your rights, whatever your client's rights, whatever they are, are now diminished as a result of that.

So, the Debtor has offered up, in a couple of different places -- I'm quoting now from their response to the lift stay motion, but I think it's the same offer -- in Paragraph 7 in their response they say, "With respect to the proceeds of post-petition sales, the Debtors are willing to provide Luxottica arrangements, similar to the ones extended

to the consignment vendors as reflected in the GOB order.

Specifically, the Debtors are willing to establish a segregated account similar to the reserve account for the consignment vendors, except that the proposed segregated account will hold only Luxottica's funds." And then they say, "The Debtor has further proposed that such account will hold a balance equal to Luxottica's average unremitted sales between payments, less the Debtors' commissions. In addition, the Debtors have been and will continue to remit the proceeds of post-petition sales, debt or the Debtors' commissions, to Luxottica on a weekly basis consistent with the license agreement."

I guess -- notwithstanding the fact that it says, "Will hold in a segregated account only Luxottica's funds," you're saying that that's really not what they're proposing?

MR. ALLERDING: That is not what they're proposing, Your Honor. They are proposing to take Luxottica's funds, continue comingling it with their own, continue transferring those funds to the DIP lender. And then, at some point, presumably about a week later, the funds come back from the DIP lender into this now segregated account, and then flip through to Luxottica.

THE COURT: Right.

MR. ALLERDING: And to address the pre-funding issue, Your Honor, their position is that there are between

one and six days of exposure during the week, and each day it increases by a day.

And they're proposing to pre-fund it by three and a half days, so, on days four, five, six and seven, we are not, there's not enough money in that account to cover Luxottica's trust funds.

THE COURT: Let me -- I think there are two -- correct me if I'm wrong -- I think there are two concerns that you have with regard to that proposal. The first is that the very fact that they put back in not the same funds, but different funds, may somehow diminish your argument that these are trust funds. That can be done -- that can be dealt with by wording. You can say in the order that it will be deemed that these are the same monies that came out. Then you're worried about credit exposure, right, that at some point that account won't be replenished with the actual amount.

MR. ALLERDING: That is correct, Your Honor, yes.

THE COURT: And I guess, on that score -- I'm not sure which of the lawyers for Weil Gotshal is handling this, so I don't know who to look to.

But I think the truism that the Debtors can't grant a lien on property that they don't own, doesn't necessarily answer Luxottica's credit concern because the money they -- I mean, it's conceivable that the money may be

spent and there's no fungible cash collateral that could equal the shortfall if it's determined that Luxottica does have a trust interest in this property that the Debtors couldn't grant a lien on, that will never be caught up.

So, I don't know if there's a way to bridge that gap somehow.

MR. SINGH: Yes, you know. Sunny Singh, Weil Gotshal on behalf of the Debtors. Your Honor, we did propose and created a technical and (indiscernible) settlement (indiscernible) is fine. We did propose that it would be funded twice a week so that it is -- we would be making payments to them twice a week so that their exposure is only three and a half days, and that it would be pre-funded with the average three-and-a-half days spent. I don't know how much better we can get than that, Your Honor. They want precisely that as the money's coming in we're sort of reporting each dollar and then be able to transfer that. We just simply can't do that as an administrative matter because these sales don't come in through a separate Luxottica account. It's within the Sears --

THE COURT: Let me just -- I mean, based on, including what your colleague said to me on the last motion, the Debtors are not projecting administrative insolvency, let alone being short on the DIP loan

MR. SINGH: Right.

THE COURT: So, it would seem to me that there should be a way to grant a priming replacement interest in the DIP collateral to the extent that the DIP lenders have used -- advanced by a ruling by me, so it's not wrongful for them to have used it -- trust fund money. And if there's any suggestion that there will ever be a shortfall, then you give them notice and, you know, they can, at that point you have to eventually change the POS system so the money stays in the account.

MR. SINGH: And Your Honor, there basically already is a mechanic for that, it's permitted prior liens. They're not --

THE COURT: So, would they be included in that?

MR. SINGH: Within the DIP? If I can just check-- one second.

THE COURT: Well, if not, you can expressly include them. I mean it's not really a lien, it's an ownership interest. So, if that's within the definition then it's easy enough to do.

MR. SINGH: So Judge, that's right. It's not a lien. Excuse me, if it's not our property, they're not getting a lien on it in the first instance.

THE COURT: Right.

MR. SINGH: So, if we need a clarification that to the extent it’s later determined that they got trust funds,

you know, and that wasn't the Debtors --

THE COURT: Same portion -- the same amount of what would otherwise be the DIP lender's collateral would go to Luxottica.

MR. SINGH: Right, they'd have to -- assuming they prove --

THE COURT: Oh, yeah, they'd have to establish all that. Correct.

MR. SINGH: All of those things they have a right to come in.

THE COURT: Right.

MR. SINGH: Right, which I don't think the DIP order precludes I think a reservation of rights on that.

THE COURT: Well, I think we should just clarify that they would -- that that's how it would work.

MR. SINGH: Right.

THE COURT: The permitted liens would preclude a trust fund interest that would take this property out of -- this cash out of property of the estate.

MR. SINGH: Right.

THE COURT: Okay.

MR. SINGH: If I could just have a minute to confer.

THE COURT: Okay.

(Off the Record Conversation)

MR. SINGH: Your Honor, I think that's fine. We would just have to -- we basically just want to make sure we're setting up the same mechanic, the DIP lenders want to make sure, as the consignment vendors so that we're reporting to them Luxottica's sales so that they can take an appropriate reserve against it.

THE COURT: That's fine.

MR. SINGH: And the only addition that we're adding --

THE COURT: No, you'll definitely want to do that.

MR. SINGH: Yeah, exactly. And the only addition that we're adding is that to the extent it's ever later determined that somebody was paid trust funds that were not property of the estate, then rights would be reserved to come back and seek to get those monies back from --

THE COURT: Well, not reserved, that the lead won't extend to an equal amount of money.

MR. SINGH: Right. That they would have -- right, and that the lenders would have to pay that back.

THE COURT: Right. Correct, out of what would otherwise be their collateral.

MR. SINGH: Exactly. Okay, I think that should be fine, Your Honor.

THE COURT: Okay. And you're nodding too, sir, so I think that resolves it.

MR. ALLERDING: I am, Your Honor. I appreciate the suggestion and I do believe that addresses our concerns. Again, it sounds like we won't be subject to losing the trust fund argument regardless of any type of co-mingling, regardless of whether the funds reside with the DIP lenders or somewhere within Sears.

THE COURT: Well, at least as of the date that you raised this issue. There may be an issue before that.

MR. ALLERDING: Understood, Your Honor, and that we won't be subject to any type of tracing or other equitable arguments of the DIP lenders or Sears.

THE COURT: As of this --

MR. ALLERDING: As of the date we raised it. Yes, Your Honor. Thank you.

THE COURT: Right, okay. I mean, look, I'm not encouraging litigation over this. I think at the right point the parties will focus on this, but, you know, I also note that this trust fund language came in, in 2015. I don't know what the financial condition of the Debtor was at that time, but it clearly improved Luxottica's rights at that point. So, there are issues here that I'm not in the position to decide today and couldn't do so even if I was because of the requirements of Orion Pictures.

MR. SINGH: Your Honor, the DIP lenders just wanted me to clarify that they would not be liable --

THE COURT: No, no, it's not out of pocket, it's that their collateral would be reduced by an equal amount of the shortfall that Luxottica would have --

MR. SINGH: Exactly.

THE COURT: -- if it's turned out to be not property of the estate, the trust money.

MR. SINGH: Exactly.

THE COURT: Okay.

MR. SINGH: So, I think that’s it on the junior DIPs.

THE COURT: Okay. Does that resolve your stay motion too?

MR. ALLERDING: I believe it does, Your Honor. If I can have a moment to go back and think about that.

THE COURT: Okay, that's fine.

MR. ALLERDING: Thank you.

MR. SINGH: Thank you, Your Honor. So, Your Honor, I guess that’s it on the objections to the junior DIP.

THE COURT: The only loose end, I think, was the suggestion that I compel the Debtors to submit an affidavit before I approve the DIP agreement, or even as a condition subsequent to approval of the DIP agreement. And I'm not prepared to do that. I think that -- obviously, judges have a concern about approving cash collateral use and/or Debtor-

in-possession financing if they're a bridge to nowhere or, in other words, that the Debtor is incurring substantial new debt or using up cash collateral while a shortfall grows for administrative expense creditors.

They're not covered by the caveats in 364 that protect existing lien holders. So, that concern that courts have is not mandated by section 364 of the Bankruptcy Code when you consider it a DIP loan. Nevertheless, courts are concerned, as part of the business judgment analysis, when they look at a proposed DIP loan as to whether the Debtor is administratively insolvent or will be rendered administratively insolvent.

But the record before me really does suggest that this money is needed to maximize the value of the Debtors' estate.

The Creditors' Committee which represents all unsecured creditors has supported with the changes that they've negotiated hard for, this DIP loan. And it would appear to me that the recoveries by all creditors including administrate the expense creditors are increased by this funding.

That being said, I think the Debtors should, among all the other things they're doing, and I appreciate they have a full plate, promptly put out proposed procedures for dealing with 503(b)(9) claims so that there can be some

assurance to the vendor community that there's a mechanism there to deal with them, and in connection with that they can, I think, probably state some views without promising perfection as to the administrative solvency of their estate or estates.

MR. SINGH: Understood Your Honor. Thank you.

THE COURT: Thank you.

MR. SINGH: Your Honor, I think the next item that we show on the agenda is Item 6, the motion to extend the automatic stay to certain non-debtor parties and I'll be turning it over to my colleague, Garrett Fail.

THE COURT: Okay.

MR. FAIL: Good morning again, Your Honor, Garret Fail, Weil Gotshal.

THE COURT: I'm sorry, can I interrupt you just for a second? This matter, I think you took off of the agenda, which is the motion to retain McAndrews, Held and Malloy, Limited, as IP counsel because you worked out an agreement with the US Trustee on it.

MR. FAIL: That's right, Your Honor.

THE COURT: I'm not sure I have, if there is such a thing, as their retainer agreement that lays out their fees. The binder didn't have it.

MR. FAIL: The schedule up there of the rates for this particular circumstance?

THE COURT: Yes. It's not just their rates, they have a fixed fee. They have a -- depending on the work they're doing, they have a fixed fee and an hourly fee. The hourly fee I'm not so concerned about because I can deal with that in a fee application. But the fixed fee, I'm being asked to approve under 328(a) and I just didn't --

MR. FAIL: I think the agreement with the US -- I thought the agreement with the U.S. trustee was rather than disclose the whole schedule of rates that -- with respect to those that were charged and used, they would be disclosed in connection with the fee application and sought --

THE COURT: But they're still asking for 328 approval, I think, which I can't do unless I can see their fees.

MR. FAIL: We're happy to provide --

THE COURT: I can change it to 330, but you know, it's -- I just wanted to raise that issue before --

MR. FAIL: We can certainly provide it to --

MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg from the US Trustee's Office.

THE COURT: Yes.

MR. SCHWARTZBERG: The flat fees are subject to 330. It's only -- which will be disclosed in the fee allocation. It’s only the fixed fee, I think it's $43,000, which is subject to 328, subject to the US Trustee carve out

and any (indiscernible) the carve out.

THE COURT: Is that fixed fee a one-time fee or is it for a cap on various matters?

MR. SCHWARTZBERG: I will leave that to the Debtor but I understand it to be a monthly $43,500.

THE COURT: All right. So, there's no separate set of, you know, $5,000 for this type of work, $10,000 for this type of work structure?

MR. FAIL: Not that’s being preapproved.

THE COURT: It's not being preapproved. It's just a -- so, it's basically a monthly retainer, but it's not a retainer, it's a monthly fee.

MR. FAIL: That’s a monthly -- there’s a (indiscernible).

THE COURT: And that was disclosed?

MR. FAIL: Yes.

THE COURT: All right, okay. Good. I saw your agreement today and I was going to raise this issue anyway.

MR. FAIL: It was a very long negotiation, Your Honor.

THE COURT: Right. No, that's fine. So, I think the record is clear on that, that the only 328 approval is of that monthly fee which is disclosed in the application. Okay. So, you could email that order to chambers too.

MR. FAIL: Thank you, Your Honor.

THE COURT: So, then you were going to do the motion to extend the stay.

MR. FAIL: That's right, Your Honor, Docket 924. We're seeking, in accordance with precedent in this Court and in this district, to extend the automatic stay the actions against the Debtors and non-Debtors to those non-Debtor parties where there is an identity of an interest, where there's indemnification or an agreement to defend and a claim against the non-Debtor would directly immediately affect a claim against the Debtors.

Your Honor, there were five objections that were filed. We've spoken with a number of the parties, and I'll go through and we've agreed to adjourn with respect to those parties other than one that refused to adjourn. So, we've adjourned and spoken to the attorneys for Marcoccia, ECF 1194; Catalfamo and Meriwether 1197; Karen Smith we spoke to, we agreed to adjourn.

I saw additional pleadings filed this morning. We received service, but we're not going to go forward with respect to that one as well. And Alex Carey filed late as well. Seems like they withdrew pleadings this morning after ten o'clock this morning, but given the late timing of those filings, we're going to adjourn and not push forward with respect to Smith, Carey, Catalfamo, Meriwether or Marcoccia.

We'll speak with those parties, hopefully give

them information and resolve the objections, if any, and then we'll back before Your Honor on that. Leaving only Mr. Krasniqi's objection to be the contested matter this morning.

The motion, you know, Your Honor, we would suggest should be granted with respect to all other parties. With respect to Mr. Krasniqi's --

THE COURT: Before we go to that, let me just -- is anyone present or on the phone for Karen Smith, Sante Marcoccia, Robert Catalfamo and Lavarita Meriwether or Alex Carey? Okay, so I think they got the message about the adjournment.

MR. FAIL: Our intent was not to prejudice any party, Your Honor, with respect to timing --

THE COURT: I mean, I think a couple of those actually had commenced prepetition litigation against only the Debtors, so you might want to point that out to them. This motion doesn't even apply to them. I don't think it applies to Mr. Carey, for example, who is just looking to have a claim against the Debtors.

MR. FAIL: We're fielding a lot of calls, Your Honor, and trying to explain the facts and circumstances. And, Your Honor, where there is true third-party insurance, the Debtors will investigate and likely stipulate to the --

THE COURT: That was the Smith issue.

MR. FAIL: Well, a lot of the parties believe that

there's insurance, but not necessarily the Smith one. Ones where there's an auto accident there may be true third-party insurance. So, I don't think it's Ms. Smith, but we'll find out and address it.

THE COURT: Okay. No, no, I'm saying that I think she may have believed there was insurance.

MR. FAIL: And, Your Honor, the Debtors did maintain insurance as was required. Unfortunately, as with Mr. Krasniqi's instance, the availability of any third-party insurance was exhausted. With respect to Mr. Krasniqi, he raised two points. One was a lack of service. We think we responded to that adequately in our reply with Mr. Krasniqi's attorney. These cases certainly received notice in advance to file his objection. We served Mr. Krasniqi himself at his home address in Manhattan and filed an affidavit of service disclosing that address. We served his prepetition counsel, and those addresses are now on file and disclosed with an affidavit of Prime Clerk.

THE COURT: I saw that affidavit.

MR. FAIL: But I think that's not the issue, Your Honor, because there's an objection on file so we should get to the substance. And on the substance, we've now disclosed that there is no third-party insurance and we've disclosed the nature of the indemnification obligation that applies to the non-Debtor defendant in his case, an escalator repair

company. And so, we think that there's adequate basis to extend the automatic stay in this case.

Mr. Krasniqi has also filed a motion to lift stay. We asked that he adjourn this motion to that date, he refused, so we would request that that motion be denied on the same basis and not be forced to return.

There simply is no available insurance, no grounds to lift the automatic stay and ample ground to extend the automatic stay for the whole action.

THE COURT: Okay. Is counsel here for Mr. Krasniqi?

MS. SCHULTZ: Yes.

THE COURT: Okay.

MS. SCHULTZ: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHULTZ: Hillary Schultz from Richard Klass' office. We represent Mr. Krasniqi. He was a plaintiff who suffered injury as a result of an elevator accident.

There actually is a fundamental jurisdictional issue here, because we believe -- the reason why we wouldn't adjourn was because it doesn't appear that the attorneys of record in this case were served with this motion.

THE COURT: Well, when you say the attorneys of record -- in the bankruptcy case or in the ...?

MS. SCHULTZ: No, in the personal injury case.

THE COURT: But they have an --

MS. SCHULTZ: And our client does not live in Manhattan. He lives in Staten Island, so he was not served.

THE COURT: Well, you filed an objection. I don't understand. They served -- did your firm file a notice of appearance?

MS. SCHULTZ: Well, just by random block, the one he -- Yes.

THE COURT: And they served you?

MS. SCHULTZ: No. Actually, what happened was it just randomly happened that someone was scanning the docket with the 1,000 items that were in the docket.

THE COURT: All right, so we should adjourn this so that you can have proper service. We'll adjourn it to the next hearing date.

MS. SCHULTZ: Thank you.

THE COURT: Okay.

MR. FAIL: Okay, Your Honor, so now all contested aspects of this motion have been adjourned to the next hearing. Unless Your Honor has any questions --

THE COURT: Well, I did have one question. All of the matters on the list, you've used the phrase “indemnity” or “indemnification agreement”, and that does appear to be the language in the Krasniqi one, for example, with the elevator company. I just want to make sure, you're not

using indemnity to cover guarantees? Or are you? If someone just has a guarantee, like a financial guarantee, this wouldn't apply to preclude a suit of that person, would it?

MR. FAIL: Your Honor, I'd have to go through the full list to ensure that. It is my understanding of the -- it has to be the vast majority or simply prepetition tort lawsuits or --

THE COURT: And they're suing the Debtor's employees or officers instead of the -- I just want to -- I don't think that I should grant this motion today with respect to any lawsuit where the third-party is a mere guarantor -- not only primarily, or independently liable as a guarantor. And I do that for two reasons.

One, I don't think the case law supports it, and two, I don't think the motion is clear that that's who would be covered. Because I think an indemnity is different than a subrogation right, or a contribution right. And that's always been -- those types of issues, dealing with subrogation and contribution rights have always been the most difficult to resolve in the context of applying Queenie v. Nygard and the other cases.

Most of the cases precede Queenie v. Nygard, but there are plenty of cases that do precede it that say you can't enjoin a lawsuit against a guarantor.

MR. FAIL: We'll go through before we submit the proposed order and ensure that there's none that of that categorization.

THE COURT: All right. And if you still want to pursue -- I'm not denying today, I just think you just have to have more notice and explain why they would be covered. There may be extraneous facts. There may be other things that would make the determination of a claim against the third party one that would directly and immediately impact the Debtor's reorganization or just the Debtors, in the language of Queenie and the other cases.

MR. FAIL: We'll adjourn if there are any that I do identify and supplement the record or withdraw our request with respect to those, Your Honor, to the extent (indiscernible). Your Honor, I think --

THE COURT: Okay. Someone’s standing behind you.

MS. SCHULTZ: Hillary Schultz again. The Debtors, in their responses indicate that there was a claim sharing agreement but they never attached a copy of it.

THE COURT: All the more reason to adjourn it, so they can show that to you.

MS. SCHULTZ: Thank you.

MR. FAIL: Your colleague refused to adjourn so we didn’t have a chance. We have to share it with you.

THE COURT: Does anyone have anything further to

say on this motion? All right.

I will grant the motion insofar as it's unopposed and consistent with the carve out, without prejudice that I just went through with Mr. Fail on the record. The motion seeks to have the automatic stay apply to or enjoin to the extent of the automatic stays, protections, lawsuits and claims against third parties. The motion specifically identifies a number of such lawsuits to which it would immediately apply if I granted it, and also sets up a procedure if the Debtors learn of another such lawsuit or claim.

It's well established that stays pursuant to section 362(a) are limited to Debtors in bankruptcy and do not encompass non-bankruptcy codefendants. See Teachers Insurance and Annuity Association v. Butler, 803 F.2d 61, (Second Circuit 1986).

However, the circuit here and in other jurisdictions recognize an exception to that general rule where non-Debtor claim -- a claim against the non-Debtor, excuse me -- can be accorded the protection of the automatic stay, sometimes phrased as extending the automatic stay or entering an injunction under a section 105(a) and in furtherance of the automatic stay to protect the third party in quote, "unusual circumstances," as stated by then Judge Sotomayor in Queenie Limited v. Nygard International 321 F.

3d, 282-288 Second Circuit 2003. See also Desouza v. Plus Funds Group, 2006 US District Lexus 53392 at page six, (SDNY 2006).

Queenie v. Nygard laid out the circumstances in which courts have extended the stay or imposed an injunction co-terminus with the stay to protect non-Debtors, with an overall statement that that really should be granted, quote, "Only when a claim against the non-Debtor will have an immediate adverse economic consequence for the Debtor's estate," close quote. That's Queenie v. Nygard at 321 F.3d at 287.

Although those economic consequences have been construed to include any perceptible economic harm to a non-party Debtor's tangible or intangible property interest in re Adler, 494 BR 43-57, Bankruptcy EDNY 2013 affirmed, Ng v. Adler 518 BR 2-28, (EDNY 2014).

But that's just the start. It has to be a direct and immediate and adverse economic consequence. In addition, courts will extend the stay where there's a session identity between the Debtor and the third-party defendant that the Debtor may be said to be the real party defendant and that a judgment against the third-party defendant will, in effect, be a judgement or finding against the Debtor. See, again, Queenie at 288 as well as in re Congregation Birchos Yosef, 535 BR 629, 633, (Bankruptcy

SDNY 2015).

And it appears to me, based on my review of the motion in the chart, that most of the third-party claims fall under that category where employees, officers and/or board members of Sears are being sued based on their running of Sears as opposed to some independent cause of action that might exist against them that wouldn't overlap, would be terminus with a claim against Sears.

And lastly, courts have enjoined actions against third parties where the action against the non-Debtor party threatens to adversely affect the Debtor's reorganization efforts in a significant way, again, as discussed in Queenie. That may or may not include instances where a decision will necessarily collaterally estop the Debtor, depending on the facts.

Here, the motion was adequately noticed, I believe, based on the certificates of service, on the parties that did not object. They've not raised an objection. And I believe that as a facial matter, in the absence of any objection, the averments in the motion establish sufficient basis for the Debtors to carry their burden of proof, which they have here, to the extent of the automatic stay. So, I'll grant the relief.

MR. FAIL: Thank you, Your Honor. The next item on today’s agenda is number nine. It’s a motion for relief

from stay by Joyce Franklin, ECF 383. I don't know if the attorney for Ms. Franklin is here today.

MS. AGNEW: Yes, this is Jaime Agnew on behalf of Joyce Franklin, appearing by phone.

THE COURT: Good morning.

MS. AGNEW: Good morning.

THE COURT: So, let me just turn to that --

MR. FAIL: Tab number 9.

THE COURT: Right. I'm looking at my own notes on this. Okay, and this is for relief from the automatic stay with respect to, I believe, a personal injury action against one of the Debtors that's currently pending in Ohio.

The Debtor's response to this states that the applicable insurance policy here, that the paid losses under that policy have already exceeded the amount of the policy. So, the Debtors are not able to do what they would normally do, which is lift the stay to permit the pursuit of insurance proceeds, since there aren't any. When was this action commenced?

MS. AGNEW: Your Honor, this was commenced in September by Ms. Franklin filing in the Lucas County Court of Common Pleas. That was September 24th of 2018.

THE COURT: Okay, so it's very recent. Right, so, it's September of this --

MS. AGNEW: However, the Debtors were put on

notice of this action back in August, August 2nd, actually 2017.

THE COURT: I'm going to a different point, which is, I'm trying to figure out how far along the litigation is, how familiar the Ohio court is, whether there's been a lot of activity in that court. If I heard you right, it was filed in September of 2018?

MS. AGNEW: That's correct, Your Honor.

MR. FAIL: September 24th, Your Honor.

THE COURT: I'm sorry?

MR. FAIL: September 24th. Two weeks.

THE COURT: September 24th, so, has there been any activity in the Ohio court? Has there even a pretrial conference?

MS. AGNEW: Not in the court itself, Your Honor. Our argument is based on the fact that we've had negotiations with Sedgwick claims, which represents the Debtor, then, approximately August of 2017. And records were submitted back in February of 2018, that would be a complete list of records needed to negotiate and hopefully resolve the matter.

THE COURT: Okay. But that could be done in the context of the claim process in this case. What you're proposing is to have a full-blown litigation in state court on this. And under the Sonnax Factors, given that that

court hasn't expended any judicial resources on it, it's nowhere near trial, it doesn't seem to me that this would be an appropriate instance where I should lift the stay to let a court that's already put in a lot of work on a matter and that's close to being tried, to let it be tried. Rather, it should go through the claim process and be dealt with in that context, particularly in a case where it's really not clear what unsecured creditors will recover.

MS. AGNEW: And that's why we ask, Your Honor, in the reply to the Debtor's objections, we have asked for a redress in the form of an alternative, which would be to allow the computation for this debt to be considered liquidated, and that we would not object to an expert if that would be deemed necessary by the Court, so, to make sure that there is a redress for Mrs. Franklin.

THE COURT: Well, there will be a redress. I mean that's what bankruptcy is all about. But I don't know whether Sears is the type of company that has lots and lots and lots of personal injury claims.

I've become familiar with grocery stores and I'm amazed at the number of people that fall down in grocery stores. But I have often, in the past, approved procedures for liquidating personal injury claims in large retail cases that have been remarkably successful. In A&P there were literally thousands of personal injury claims.

I don't believe one went to trial. I think they all went through those procedures which included a streamlined claims form, preliminary offers, review that would escalate through just dealing with a claims agent and then to a mediator and then to an arbitrator. It's too early in the case to mandate a specific approach for a specific claimant. And just as I urged the Debtors to focus on 503(b)(9) claims procedures, I would hope that they would be doing so with regard to PI procedures, although since those are unsecured, general unsecured claims, I'm not going to force them to do it on an expedited basis. It's just in terms of prioritizing the work that's something that should be done reasonably soon but is just not required to be done right away.

MS. AGNEW: And that's understandable, Your Honor. I just would make the argument though too that, because they had the record since February 2018, we do make the argument that we believe this is capable of ready determination and should have been already reviewed by Sedgwick claims and there possibly, based on their email communication, was made prior to the commencement of the actual filing in Lucas County, that this would be ascertainable as to a number to come up with, which would allow it to be considered liquidated rather than unliquidated.

MR. FAIL: Your Honor, there have been no bar

dates set. The Debtors have not filed a schedule SOFA. Ms. Franklin has not alleged a dollar amount in a proof of claim. She has not filed a proof of claim. File the proof of claim, and when -- the Debtor's position is that when it's reasonable to spend money to reconcile general unsecured claims, they will proceed to do so promptly and efficiently.

THE COURT: And that's a reasonable position for a Debtor to take. One of the -- I mean, obviously, the automatic stay is, along with the discharge, the primary Debtor protection. One of the reasons for it is a simple cost benefit analysis. It's not just to prevent races to the courthouse, it's to, in the context of the collective resolution of all the claims against all the assets of the Debtors, to come up with an efficient way to deal with all of the claims that make sense. And it's really too early in the case to do it on an ad hoc basis.

MS. AGNEW: And, Your Honor, I --

THE COURT: The money is better spent elsewhere.

MS. AGNEW: Okay, so --

THE COURT: I was just affirmed on this yesterday. So, you can look at in re Chitter on it, Judge Hellerstein.

MR. FAIL: Your Honor, all of that said, the Debtors will be filing motions probably shortly within the new year to get authority to settle both those petition

actions and prepetition claims within thresholds with the UCC's consent up to different thresholds as Your Honor has approved in other cases.

THE COURT: On PI claims?

MR. FAIL: On all claims, Your Honor. On all actions.

THE COURT: On all claims, okay.

MR. FAIL: Just to make it more efficient and a better use of judicial resources.

THE COURT: Okay, very well. I'm going to deny this motion. It's, as with any denial of a lift stay motion, it's without prejudice to your right to seek relief from the stay in the future on changed circumstances. But I don't see a basis under the Sonnax case in the case law for lifting the stay.

MS. AGNEW: And that includes the hinder, delay or defraud provision of 727(a)(2), Your Honor?

THE COURT: Well, that doesn't apply to this Debtor. That's a Chapter 7 provision.

MS. AGNEW: All right. Thank you, Your Honor.

MR. FAIL: Your Honor, the next item on the agenda is the motion of the Community Unit School District 300 for relief from the automatic stay. I'll turn the podium over to the Movants. Thank you, Your Honor.

THE COURT: Okay.

MR. KADISH: Good morning, Your Honor, Allen Kadish, Archer & Greiner, for Community Unit School District 300. With me Ken Florey who is principal counsel in Illinois, for the school district.

MR. FLOREY: Good morning, Judge, Ken Florey on behalf of the School District 300

MR. KADISH: And on the phone, Matt Gensburg, also in Chicago.

THE COURT: Okay.

MR. KADISH: Matt, do you want to make your appearance.

MR. GENSBURG: Good morning, Your Honor, Matthew Gensburg on behalf of the School District.

THE COURT: Good morning.

MR. KADISH: Your Honor, this is a more unique motion to lift stay. Let me start this way, the purpose of this hearing is to make sure that when we come back in January we have a substantive hearing and we can ask for a definitive ruling. And the reason we're anxious to get to a definitive ruling is because there's a fund of about $16 million --

THE COURT: I'm sorry, ruling on what? I don't know what's scheduled for next month.

MR. KADISH: On this motion for relief from stay.

THE COURT: I though that's what was on for today.

MR. KADISH: We're here today -- well, we'll take the ruling today for sure. But, we're here today after discussions with Weil Gotshal for a preliminary or a status hearing so that we can come back in January for a substantive hearing and a ruling.

There's a fund of $16 million sitting with the village, also represented here this morning. 55 percent of that fund is in dispute in action that we have pending at the School District in Illinois. That's about $8.8 million, and that's what is before the Illinois court.

There's about 45 percent of that money, $7.2 million which is due to local governments, which is really not put in dispute in the Illinois action.

We have tried to discuss whether we can separate what's in dispute and what's not in dispute. There was a reference in the Debtor's response that we were trying to work on some interim resolution as to pieces of this, but we're just not there, Your Honor.

So, we're prepared to proceed with our motion. In January we filed an affidavit of a witness so that the Debtors understand really what our position is and what our factual presentation would be in support of the Sonnax Factors and --

THE COURT: Okay. And I do see that this was moved to being a status conference, so I -- well, I guess

... I do not -- I think you're going to have to make clear to me whether this is -- and this applies to the abstention portion of the motion too, whether this is a litigation that pertains to a claim or the allocation of tax money that is all attributable to the post-petition period. I think that's important. And, obviously, I'll be asking about the status of the litigation in Illinois. I think it's pretty recent.

MR. KADISH: It's pretty recent, and it's recent because the money is now funded and susceptible to distribution.

THE COURT: Okay, so, I mean if it's a claim, I'm not quite sure why it wouldn't be dealt with here, because it's a claim against the estate, but we could deal with that at the next omnibus date.

And then, just as far as the conduct of the hearing is concerned, my normal practice is to take direct testimony by declaration under penalty of perjury or an affidavit and then to have the witness here for cross-examination and redirect and to have the parties submit a joint exhibit book a week before the hearing, of having agreed on as many -- the admissibility of as many exhibits as they can, in good faith. And if there's some exhibit that you can't agree on the admissibility of, just put it in a separate binder.

I really don't encourage motions in limine unless it really affects your whole hearing strategy, so I'll probably just rule on the -- if there is an exhibit that's in dispute at the hearing. But this is just regular state court, right? This is not a special tax court or anything like that

MR. KADISH: Right.

THE COURT: So, to me the issue is more an abstention issue than a stay issue. Just as a head's up, I don't think you're going to get relief from the stay unless -- but I'm not sure -- I don't think I know enough about this litigation to know whether it's something that I should abstain on. And, of course, there's the timeliness issue too, but that's why I'm asking about whether this is a claim against the Debtor or whether this is the Debtor trying to get money from you all.

MR. KADISH: And, Your Honor, I hear how you've mapped it out, but just not to leave the record suspended for today, these are funds sitting, waiting for disbursement. So, I think our perspective is that this is not -- and I hear you and I understand you, not so much wrapped up in the claim question, but is Sears entitled to a distribution today of the money that's sitting, literally, sitting in an account, if they don't qualify for it.

THE COURT: But that's not a lift stay motion,

that's a determination on the merits.

MR. KADISH: Well, and our lift stay is so that we can go into the state court and continue the TRO and the proceedings in front of the state court to determine that question.

THE COURT: But again, if it's fundamentally the taxing authorities -- I'm sorry, not the taxing authorities, the villages -- but if they're holding it rather than distributing it to Sears because they say they have a claim to it, then I don't see how I would abstain because it's core. It's fundamentally --

MR. KADISH: Yeah, I don't think --

THE COURT: -- the issue. Well, that's the issue.

MR. KADISH: I don't think that's the focus.

THE COURT: I'm not trying to prejudge it. I'm just saying that's the issue. On the other hand, if this is something that gets done every four months and we're in the post-petition period and it's the four-month calculation, then it's probably a different issue.

MR. GENSBURG: Judge, Matt Gensburg. If I could just provide some clarity here on one point.

There's two aspects to this. One aspect is there's a pool of funds held by the village that Sears only has a claim to if it complied with the Illinois EDA Act. And they haven't complied with the Illinois EDA Act. It's

not property of the estate. They have no claim to it and it should be disbursed to other taxing authorities.

There's also an issue, Your Honor, with respect to funds that they've previously received. There is an argument that's been made by the school district that those funds were disbursed to them on a prepetition basis when they weren't complying with the Illinois EDA Act, and there's consequences to that.

So this issue has two aspects, and what's compounding it all is that the funds held by the village presently also include 45 percent that's right now due to the other taxing authorities, and those funds are being held up also. And those funds are funds that have been budgeted by these school districts and taxing authorities, library districts --

THE COURT: Well, I --

MR. GENSBURG: -- for their --

THE COURT: Let me just interrupt you. I hope you could have a resolution on those, but I'm not going to deal with that today. As to the other two points, I mean, the latter point, if you're trying to get something back from the Debtor, that, to me, sounds pretty much like a claim. And on the first point, I can see where lawyers can phrase the question to make it either a claim or not a claim, and I'll have to decide.

But on the -- if everyone agrees that 45 percent of this money really doesn't belong to either Sears or the people who are holding it, but should go to other parties, then I don't know why that can't be agreed to.

MR. KADISH: We've been trying to get there.

THE COURT: Okay. Good.

MS. MISHKIN: Your Honor, Jessie Mishkin from Weil Gotschal on behalf of Debtors.

THE COURT: Good morning.

MS. MISHKIN: Good morning. Notwithstanding that this is a status conference, I'll just respond very briefly.

As reflected in our reply papers, and as we would demonstrate at a substantive hearing, we don't believe that the school district has met its burden on the Sonnax Factors or on abstention.

Just to respond to what I do believe is a mischaracterization of why the 45 percent of the distribution is being held by the village and why there is not yet agreement, respectfully, it's the school district's complaint, which was filed on October 10th, that caused in our understanding the village to be concerned and withhold the entirety of the 45 percent distribution to the district.

THE COURT: That's fine. I don't want to get into that. I just -- if there's a -- as long as the Debtor isn't giving up rights, I could think the Debtor should be able to

agree to do something to facilitate that money going to someone else. That's all I'm saying.

MS. MISHKIN: Your Honor, we're certainly -- respectfully, have been and will continue to try and work that out. Thank you.

MR. SCHEIN: Good morning, Your Honor. Just briefly, Michael Schein, Vedder Price, on behalf of the Village of Hoffman Estates.

We're the parties kind of caught in the middle between this dispute. The funds that we hold are not village property. They are property that either go to Sears or the other districts including District 300.

THE COURT: Well, if it goes to Sears, then that's a different story.

MR. SCHEIN: Correct, Your Honor. The issue we have is the village operates by statute. Statute obligates the village to make those distributions. It doesn't have a timeline, but course of dealing is those distributions are made twice a year including one now at the end of December.

Because of the dispute in the litigation and pending Your Honor's actions, the village is holding all that money, but some portion of that money, about 30 percent of the 45, doesn't belong to either the District 300 or Sears. It belongs to other districts who are entitled --

THE COURT: Well, if people can all agree on that,

then I don't see why --

MR. SCHEIN: Correct, Your Honor.

THE COURT: -- that can't be resolved.

MR. SCHEIN: We're just raising it to you because one of the issues the village faces, at some point, they have to make a distribution or they face their own liability.

THE COURT: Well, there is something called the Supremacy Clause and I think that would excuse them from that liability.

MR. SCHEIN: Absolutely, Your Honor, and I'm only saying that because at some point we hope this Court, if we have to, will make a decision on to where those funds go. We just want you to be aware.

THE COURT: Well, but it's not just the decision on where they go but even before then, 362 trumps Illinois law on this issue, so --

MR. SCHEIN: Correct. And we haven't made any distribution just for that reason.

THE COURT: Good.

MR. SCHEIN: Thank you, Your Honor.

THE COURT: Okay.

MR. KADISH: And Your Honor, just last on the hearing management is we're going to need a date not the next omnibus on January 18th, I believe. We're going to

need a different date.

THE COURT: All right.

MR. KADISH: So I'll leave that to Weil Gotshal to help us --

THE COURT: Well, is that because I'll be taking evidence and testimony, you think?

MR. KADISH: Well, also our witness is unavailable on that date.

THE COURT: All right.

MR. KADISH: We've had discussions. We've tried to find some dates, so I assume they'll be in touch with chambers to work out a date.

THE COURT: All right. Well, if it's a non -- if it's an evidentiary hearing but not a major evidentiary hearing, I'd like to do it on an omnibus date because that's why we have omnibus dates. If it's a full-blown evidentiary hearing, which I'm not sure it will be, then you should have a separate date and you can talk to Ms. Lee about that.

MR. KADISH: I think this is not a many hours hearing, but our witness will not be available on the 18th.

THE COURT: So it should probably be the February date, then.

MR. KADISH: I don't know, again, dealing with all these pressures that we can wait until February.

THE COURT: Well, that's why I'm urging you to try

to work out the now maybe 30 percent that isn't claimed by either of the two parties to this particular dispute. Okay. All right, and is counsel for Luxottica, have you decided whether this either resolves it or leads you to want to just adjourn it and think about it some more?

MR. ALLERDING: Yes, Your Honor. Thank you for giving me time to think about the issue. I do believe that there is a remaining issue under the motion for relief from stay which is $198,000 shortfall that the Debtors failed --

THE COURT: Plus which, there's money that you're holding.

MR. ALLERDING: There is, under defensive recoupment.

THE COURT: Which I learned about in the objection to your motion.

MR. ALLERDING: Understood, Your Honor. As we noted in our reply, we have asserted that equitable defensive recoupment with respect to those funds which all arise under a single integrated agreement.

THE COURT: Well, the agreement does have its internal set-off provision. I mean, I don't know why this can't be worked out.

MR. ALLERDING: Your Honor, I don't know why the whole thing can't be worked out.

THE COURT: Well, but on this point, I mean, I

don't know. I think it's probably because everyone was -- wanted to see what would happen today. But I think the agreement has a method in there for accounting and I -- as long as the terms of the agreement are complied with, I don't even think you need Court approval for it. You just resolve the two claims.

MR. ALLERDING: My understanding, Your Honor, that we can exercise rights under the contract --

THE COURT: Well, depends if it's pre or post.

MR. ALLERDING: -- with respect to set-off.

THE COURT: If it's post, certainly.

MR. ALLERDING: Okay.

THE COURT: If it's pre, that's a different issue.

MR. ALLERDING: Okay, Your Honor. And then I guess I would --

THE COURT: And I don't know why you're not sending the rest back right away.

MR. ALLERDING: I'm sorry?

THE COURT: You claim they owe you less than I think you owe them. So I don't know why you don't send them back the rest.

MR. ALLERDING: The equitable defensive recoupment, Your Honor, is asserted against -- it's not subject to the automatic stay, so --

THE COURT: No, but --

MR. SINGH: Your Honor, they're applying it to their prepetition claim.

THE COURT: Well, that's an issue. I mean, the agreement says set-off. It doesn't say recoupment. So I don't know if this is a running account or not. So you all should discuss that.

MR. ALLERDING: We can discuss that, Your Honor.

THE COURT: Okay.

MR. ALLERDING: I would ask the Court then --

THE COURT: I mean, you have a lien on it anyway, so that's why you'd probably resolve it.

MR. ALLERDING: I'm sorry, Your Honor?

THE COURT: If you have a valid set-off right, you would have a lien but then there's the pre and post issue. The mutuality issue.

MR. ALLERDING: With respect to set-off, there is. Yes, Your Honor.

THE COURT: Yeah, right.

MR. ALLERDING: Your Honor --

THE COURT: And I think that's the word the agreement uses, set-off.

MR. ALLERDING: I don't have it off the top of my head, but I'm not --

THE COURT: I checked. Set-off.

MR. ALLERDING: I would suggest, Your Honor, that

I don't believe that we lose --

THE COURT: I should look through it and see a running account. And maybe that's how the parties have dealt with it, but I think you and Mr. Singh can probably resolve that.

MR. ALLERDING: Understood, Your Honor.

THE COURT: Okay.

MR. ALLERDING: I do think that then we would ask the Court to hold the motion in abeyance with respect to the post-petition co-mingling issue that we discussed before such that Luxottica could move for relief on an expedited basis should there be a shortfall in the DIP collateral. We would also ask that the Court in its --

THE COURT: Well, I don't want to just carry it sine die?. I think you should just make a new motion, if that happens and you can get it on in an expedited basis.

MR. ALLERDING: Okay, Your Honor. We would also ask that in addition to the claim which we discussed before that this could be clear that the language we discussed regarding the carveout, for lack of better word, apply to both the senior DIP financing objection that Luxottica still has pending and the junior DIP objections that's currently before the Court today. And also that the order contain language providing that the Debtors -- that at the time that the Debtors first distribute the DIP collateral, if this

issue is not resolved that the Debtors will establish a reserve in the amount owed to Luxottica and will not --

THE COURT: If you're paying them out completely?

MR. ALLERDING: I'm sorry?

THE COURT: You mean if at the time that the Debtors would be satisfying the DIP completely?

MR. ALLERDING: Well, my understanding was that we would recover before the DIP lenders --

THE COURT: If --

MR. ALLERDING: -- for the amount --

THE COURT: If -- I'm just trying to figure out the timing. There'll be lots of times when there'll be collateral paid to the DIP lenders. I don't want this to happen every time. It's the last time; right? The last time when they're about to --

MR. ALLERDING: I think that will work, Your Honor.

THE COURT: -- they're about to be paid off.

MR. ALLERDING: Yes, Your Honor.

THE COURT: That's fine. That's fine. But on the other point, I mean, I guess that's okay as long as the ABL lenders preserve their rights. I mean, there was an issue as to whether the trust language is subject to their lien, because their lien came first. So as long as they preserve their rights, I don't have an issue with that.

MR. ALLERDING: Your Honor, I confirm. And the way we dealt with it in the senior order was that we're continuing to work this issue out so it was preserved.

THE COURT: Okay.

MR. ALLERDING: So I think that's fine and the same sort of recitation I read earlier would apply.

THE COURT: All right.

MR. ALLERDING: Your Honor, I do just want to make sure that we're not going to be spending a lot of time negotiating language, because we do want to get the junior DIP order entered.

THE COURT: No, the record is clear on this. People can rely on the record, and it's consistent with the reservation of rights. So all we're really talking about -- you can get the language right out of the transcript and just put that in.

MR. ALLERDING: Exactly. Thank you, Your Honor.

THE COURT: Okay. So as far as this lift stay motion, I'm going to deny it without prejudice to your right to bring another on in the future and I think if you're looking to recoup, it's better to seek permission because it may not be recoupment, unless you resolve it.

MR. ALLERDING: Understood, Your Honor.

THE COURT: Okay. All right.

MR. ALLERDING: Okay. Thank you, Judge.

THE COURT: Okay, so does that just leave the Omega --

MR. ALLERDING: I think we're just back to --

THE COURT: Omega motion?

MR. ALLERDING: Yes, that's right, Your Honor.

THE COURT: So everyone who was here for something else, you're certainly free to leave or get off the phone or whatever.

MR. GENSBURG: Your Honor, Matt Gensburg again for the school district. I apologize for piping up a little out of turn here, but it's difficult to participate telephonically.

THE COURT: Right.

MR. GENSBURG: I'd just like to get some clarity on the timing issue with respect to the subsequent hearing.

THE COURT: Well --

MR. GENSBURG: There's really two issue --

THE COURT: Okay.

MR. GENSBURG: There's really two issues that drive the timing a bit, Your Honor. One involves the 55 percent and the need that this be resolved before the village disburses those funds one way or the other. And as long as the village agrees to hang onto those funds pending a ruling by the Court, we're fine with the February hearing, I guess.

On the 45 percent, it's very different. And if there's not an agreement with Sears -- because I don't believe they're asserting a claim to that, but they'll get back to us more definitively on that point.

There's real budgetary issues that involve contracting with vendors and construction companies that need to be resolved and if this hearing takes place on that aspect of this in February, that means we won't have the funds for purposes of contract and budgeting until March or April which will affect the whole school year. And that's why there's some urgency here and that's why the school district filed for a TRO in the State of Illinois to get this resolved as quickly as possible.

THE COURT: Well, if the -- if we're just talking about that issue, I don't see why you need a witness for that. We could have that on the omnibus day in January.

MR. GENSBURG: Possibly, Your Honor. The only real factual issue in my mind from the Sonix perspective is a weighing of the burdens between Sears and the school district with respect to modifying the State of Illinois to decide an issue as to whether the EDA Act has been complied with or whether Sears, in fact, has any interest in the 45 percent. Other than that, I see this as largely a legal argument and a legal issue.

Susan Harkin whose affidavit we provided is just

not available on the 18th of January.

THE COURT: All right. Well, I don't know what her testimony is, but if it looks like we need to bifurcate these issues and we can go ahead on one that is time sensitive without her, because her testimony would go to something else, then we can have it on -- that part of it in January.

MS. MISHKIN: Your Honor, Jessie Mishkin for the Debtors again.

I just want to, again, make clear that Debtors are not interested in standing in the way of the distribution of the 45 percent. We think the 55 percent should be distributed, too, and the claims process as to that take place. I was just speaking with Mr. Gensburg's colleagues outside. We agreed to continue discussions tomorrow to try --

THE COURT: Okay. So hopefully we can resolve it even before that hearing -- that issue.

MS. MISHKIN: That's the goal, Your Honor.

THE COURT: Okay. Very well.

MS. MISHKIN: Thank you.

THE COURT: Okay. If not, speak to yourselves about scheduling it for January with minimal testimony.

MS. MISHKIN: Thank you, Your Honor.

THE COURT: Okay. All right.

MR. KIRPALANI: Good afternoon, Your Honor. Susheel Kirpalani from Quinn, Emanuel, Urquhart, and Sullivan on behalf of Omega advisors. With me in the courtroom today are my colleagues Jon Pickhardt and Andrew Soler.

I know one thing that judges hate is not being told the truth about what is really motivating the conduct of the parties before them, so here goes from my perspective.

Your Honor, Omega is an interested bidder for the Debtors' medium-term notes because it bought a significant amount of credit default swap protection on SRAC bonds. Cyrus is the largest seller of that protection and under the ISDA rules, Cyrus can require a buyer of CDS to physically deliver the bonds as a condition to honoring its CDS commitments.

Thus, there is a temporary, albeit uncorrelated value of the MTNs to purchasers of CDS protection up until the time Cyrus demands delivery. You might think, Judge, as I did before I got involved in this about 10 days ago that an insurer of bonds simply pays the difference between the amount the Debtor distributes and the amount that was owed on the bond, but for practical reasons, the CDS market doesn't work that way.

They don't wait until there's a plan or an

ultimate bond holder recovery. Instead, ISDA tries to approximate the recovery value on the Debtors' bonds by seeing what people are willing are willing to pay for it -- for the bonds in the open market.

But what if the seller of CDS protection tries to take all the bonds off the market or at least all of the bonds that ISDA would consider deliverable obligations. It comes down to basic supply and demand, Your Honor.

Buyers of protection would find themselves scrambling to overpay for whatever bonds may be available for sale. It reminds me of when I was a kid and the little Cabbage Patch dolls were way overpriced at Christmas. But that is precisely what's happening right now and led to the Debtors' decision to sell otherwise worthless bonds, and it was a good decision at that.

Whether or not it is legal for CDS sellers to buy up bonds to artificially inflate the price of the remaining bonds is a separate question for a different Court on another day. But while the short squeeze is happening, the Debtors should benefit from it if at all possible. And knowing the true motivations of bankruptcy participants has been a concern of this Court for many years.

Indeed, I remember a city bar association panel over a decade ago where Your Honor or Judge Gerber or maybe both of you talked about the perverse incentives that lurk

beneath the surface in big Chapter 11 cases and Your Honor and other judges urge that Rule 2019 should require disclosure of all derivative positions such as short positions, CDS, and the like so that Courts can clearly see what is going on.

And it certainly took a lot of effort, but change did happen in 2011, as Your Honor knows, and the rule was expanded.

This one, Judge, this case may be the first of its kind. The first time when the rules and behavior of the CDS market have actually directly impacted the value of the Debtors' estate. And once again, this Court is in the best position to act to remedy an abuse.

We filed Omega's motion because what happened here was wrong and it's not wrong in just one way. It's wrong in the one way that the bankruptcy code forbids, the sale and use of property without proper notice and without authority by the Court.

In leading up to today, I've been struggling as to why am I fighting with the Debtors and the Creditors' Committee, for that matter. There's so obviously a transaction that was never authorized that everyone in this courtroom, even Cyrus, as a self-proclaimed longstanding creditor of Sears should agree is void and that will generate an additional $60 million for Sears, money that

from the looks of things from the bleachers is sorely needed in this case. I'm of course referring to lockup agreement over the MTNs that are owned by a wholly-owned non-Debtor, Sears Re.

Judge, in terms of context, at the conclusion of the auction conducted by the Debtors, well before anyone knew the details of what actually happened or what was negotiated, our client submitted a written offer to Sears Re to pay 40 cents on the dollar for $150 million of their $1.4 billion of medium-term notes. That's $60 million that's still on the table as I stand here before you.

And the Debtors have conceded that Sears Re's MTNs were never part of the relief they were seeking. The problem, of course, is that the Debtors have contractually bound themselves to prevent Sears Re from monetizing those MTNs until after the ISDA option when they're worthless and no one will buy them.

The fact is that the Debtors did enter into an extraordinary agreement which has never been filed with the Court which they had no authority to sign in response to an overreach by a bidder that had them over a barrel. But that bidder knew absolutely well that no authority had been sought from the Court with respect to those bonds from its participation before you in the sale motion proceedings. So the Debtors and Cyrus today have no choice but to back

themselves up and try to argue that Section 363 isn't implicated because no one technically sold Sears Re's bonds.

But it cannot seriously be disputed that as a matter of law, the lockup agreement signed by the Debtors -- not talking about Sears Re -- by the Debtors in connection with a sale was a use of property outside the ordinary course of business. Indeed, according to the Debtors and Cyrus, it was an integral part of the benefit of the whole bargain that unquestionably was outside the ordinary course both under the vertical test and the horizontal test as well as the indisputable transcript of proceedings before the Court as to what creditors expected was going to be done with respect to those non-Debtor owned MTNs. And the never got Court approval for that allegedly integral part.

By ordering that the Debtors today had no authority sign an agreement to shackle its wholly-owned subsidiary, this Court could unlock $60 million of value.

THE COURT: How is that?

MR. KIRPALANI: Because our client is still prepared to consummate the transaction and the offer for the $60 million, it's for $150 million of the MTNs that are owned by Sears Re. It has nothing to do with the actual bonds purchased. This has to go with whether or not they are shackled and prevented from selling those and whether or not the Debtors are going to continue to prevent their

wholly owned subsidiary from monetizing that asset.

So the Court could actually take the two forms of relief we're seeking -- there are three forms. One, the non-Debtor assets just -- we're not part of this. I think everyone agrees with that, that any restriction that the Debtors put on that is void under In RE: Lavigne, Second Circuit case, 114 F.3d 379, as well as the record before this Court that they're not being treated. And the Debtors will be better off. The unsecured creditors, the administrative creditors, everyone will be better off by $60 million and there's no unwinding of any bonds that actually changed hands.

We have two other forms of relief that we're seeking. The fact that there were over $600 million of MTNs owned by the Debtors that were not noticed for sale because, frankly Your Honor, there was a botched notice with respect to the Debtor owned MTNs, the sale or use of which the Court certainly did authorize. Our motion just seeks application of black-letter law and the basics of bankruptcy practice.

Judge, I know you know that I was blessed with great mentors. They drilled into my head that every word in the bankruptcy notice needs to be right. It needs to be precise. That's because notice is the critical component of due process. It's the underpinning of finality of bankruptcy sales. In fact, typically approvals of all kinds

of bankruptcy notices come before you and they're sought even before they're sent out. Certainly at a minimum in a bankruptcy sale, the notice has to match what is being sold.

That didn't happen here, meaning that bidders other than Cyrus were affirmatively misinformed about what was up for sale and the Debtors could have but chose not to rectify the misinformation during the auction. So what is the Debtors' answer to that? They say we didn't click on all the available hyperlinks on the electronic notice. The Debtors can't be serious that bidders should have performed hyperlink gymnastics to see what was going to be sold to Cyrus. Frankly, this isn't a case about failed bidder due diligence. Everyone knew how many MTNs the Debtors actually owned.

What they were doing, though, was reading the sale notice that the Debtors actually sent. The fact is, there was a total imbalance of information and it is because the notice was botched. The Debtors could have fixed it but didn't. They barreled ahead with Cyrus and then they kept mum about it until my partners threatened to bring it to your attention and then they said they would file a Form 8-K and that's how we learned of it.

In conclusion, Judge, I have to mention the third part of relief that we're seeking which has to do with Cyrus' misconduct. I have to talk about good faith. I've

read all the transcripts and I understand how we got to where we are in terms of the sale order, but there is something fundamentally wrong with Cyrus lying in the weeds as it slipped purportedly innocent language in the sale order that it uniquely knew would chill bidding and that had its intended effect.

THE COURT: Can you just go through what that language is?

MR. KIRPALANI: Yes, Your Honor. It's in the sale order. It was the language that Your Honor had a colloquy with Debtors' counsels about when Cyrus announced it was withdrawing its objection as long as this innocent boilerplate language got put in, and it appears in a couple of places. Let me just find my order, Your Honor. I'm sorry.

So at the Court's order, it's Docket 826 and so it first appears in Paragraph 6 in the proviso. Mr. Pickhardt will correct me if I'm wrong, but I believe it's the proviso. "Provided, however, that the MTNs are not being sold free and clear of any liens or claims of SRAC including without limitation any counterclaim, defense, or right of offset held or that may be asserted by SRAC or it's estate and nothing in this order shall impair or prejudice in any way any rights, claims, or defenses that SRAC or its estate may have in connection with the MTNs."

And that language, I think, is parroted later in the next paragraph as well. This language was put before you on the supposition that they're just restating what's the general obligations law. But Cyrus uniquely knew something because Cyrus -- which I don't even know if the Court knew -- is a member, a voting member of the ISDA Determinations Committee. That committee propounds rules for when bonds are considered deliverable obligations -- in other words, they'd be worth something to the Debtors -- or not deliverable obligations -- in other words, no bidder would bother trying to buy it. And that language tracks almost verbatim the ISDA rules on what is a disqualified or an excluded obligation. And I'm not just --

THE COURT: I don't understand. You have to explain that to me. I mean, it's inherent in the bond that if there's -- it's inherent in any general obligation's --

MR. KIRPALANI: Right.

THE COURT: -- transfer.

MR. KIRPALANI: Right. But when marketable bonds, when they are sold in an ISDA auction, there is to be nothing other than what is presumed in the law. When that language was included in the sale order the night before the auction, market participants including Bloomberg wrote articles. And I can show them to the Court. I have copies for everybody -- saying this language that was put into the

order, that's going to really spook bidders because --

THE COURT: But why?

MR. KIRPALANI: Because the ISDA guidelines say if a bond is subject to these -- almost verbatim the same words, it will not be considered a deliverable obligation.

THE COURT: Why?

MR. KIRPALANI: I do not know.

THE COURT: I mean, that's the law.

MR. KIRPALANI: I do not know.

THE COURT: I mean, every bond has that unwritten proviso.

MR. KIRPALANI: I think -- I can't disagree with what you're saying, Your Honor, about what a restatement of the law is. What I am suggesting is that there was never an opportunity for the Court to understand from someone who was in a unique position to absolutely understand. The reason it's withdrawing its objection to a sale that it was fighting is because they got what they needed anyway by putting this language in. Now the market will be chilled for the bids. The next day, they will talk to --

THE COURT: I thought that they confirmed that they weren't going to pursue any -- I thought as part of the bidding --

MR. KIRPALANI: Yes.

THE COURT: -- they'd said that they weren't going

-- SRAC said there are no objections.

MR. KIRPALANI: Yes, Your Honor. Actually, that was in response to our efforts to tell the Debtors' counsel, because we were trying to help the Debtors, that you don't understand what you just did. By including that language you're actually spooking a lot of participants in the market.

You should call ISDA. You should clarify there are -- there is no such hair on these bonds, and otherwise, no one's going to bid, and they did but the damage had been done because we have a timeline, too, Your Honor, of exactly how quickly things had to happen on the morning of the 20th from 8:40 in the morning until noon when the bid deadline was. And yes, the Debtors did the best they could under the circumstances, but the question really, Judge, when it comes to good faith is --

THE COURT: Well, do I have any evidence that this chilled bidding?

MR. KIRPALANI: Well, there's no evidentiary hearing before you today, Your Honor.

THE COURT: Right. Is there anything in the record to suggest that?

MR. KIRPALANI: There -- I mean, affidavits could be submitted.

THE COURT: I mean, you'd think that the people

that are bidding this who engage in this market would've read the general obligations law which has been quoted in bankruptcy cases dealing with what they also thought chilled claims trading and were educated otherwise for the last 15 years, including KB Toys. So I just -- it's kind of bizarre to me that people would be that ignorant who are dealing with so much money. But I guess you learn every day.

MR. KIRPALANI: Your Honor, I certainly am no expert in the CDS market. What I will tell you is that right after the Court entered the order that included the language, there was an article in Bloomberg November 19th by people who are experts in this area who have no interest in this dispute and the article is quoting, "They may be trying to create some uncertainty, said Julia Lu, a partner at Richards, Kibbe, and Orbe."

Whether or not justified, people may be hesitant in assuming they can deliver those notes into the auction precisely because the language tracks the ISDA guidelines.

THE COURT: Well, she didn't say that and that's just some lawyer responding to some --

MR. KIRPALANI: That may be.

THE COURT: -- report.

MR. KIRPALANI: That may be, Your Honor. Isn't the real question, though, when it comes to motivations, there is a reason I started with that today, is why was

Cyrus willing to withdraw its objection to a sale with just the inclusion of seemingly innocent boilerplate, general obligations language? Why was Cyrus then taking that language and with it, pointing to it during the auction, which they admit in their papers, that they may have engaged in some "market chatter" about whether the MTNs in light of that language will be deliverable obligations.

They call it market chatter. Judge, whether you call it market chatter, locker room banter, or any of these kinds of phrases that people say when they're being defensive about their conduct, it's not market chatter when it's an ISDA committee member who is voting the day of the Determinations Committee's determination to say, hey, take a look at this language. Can't be so sure they're going to be deliverable.

And we know. We attached the results of the votes the say of the Debtors' auction by the ISDA DC members, and of course, Cyrus did vote against deliverability. Doesn't it make you scratch your head, Your Honor, to say you were trying to vote to make these bonds worthless at the same time you were bidding to buy the bonds? You wanted them to be worthless? It doesn't add up. There is absolute attempt by Cyrus to use its influence on the DC --

THE COURT: But doesn't it only matter if the price was affected?

MR. KIRPALANI: But the price was affected, Your Honor.

THE COURT: Well, I don't...

MR. KIRPALANI: The price was affected.

THE COURT: That's hard for me to see.

MR. KIRPALANI: But a transaction is a moment in time. You know, it's always hard. And the second Circuit found it very hard to go back after General Motors. You don't know what would have happened had things been done properly, fairly --

THE COURT: I understand your first two points. It's just the latter one. It just seems like a bit of a stretch.

MR. KIRPALANI: My point on the latter --

THE COURT: There was no doubt that if they had their druthers, these wouldn't be sold in the first place.

MR. KIRPALANI: Right.

THE COURT: But they lost on that point, and you're saying that they snuck something in. But what they snuck in, I think anyone with half a brain would've figured out, is meaningless. And then there's the notice on the actual auction which says SRAC's waived any of these rights.

MR. KIRPALANI: All I'm saying, Your Honor, is that the time pressures on bidders -- we bid. We stand by our bid. We bid after the auction for the bonds we believed

and we still believe are available for sale. There definitely was chilled bidding in our view, Your Honor. I understand you don't have evidence on that. All I'm saying is that for Cyrus to point to an advanced finding by the Court that a bidder who participates --

THE COURT: Well, no, there's also --

MR. KIRPALANI: -- in the auction --

THE COURT: There's another proviso here that says, "Provided further nothing contained in this order shall waive any rights of the Debtors, the Committee, or any other party or governmental entity to the extent it is determined that a party engaged in inappropriate conduct with respect to the transactions contemplated by this order."

MR. KIRPALANI: Yes. We greatly appreciate that language, Your Honor. You know, in conclusion, we do not believe contrary to the Debtors' citation to the sanctity of finality of sales, contrary to Cyrus' self-proclamations of being longstanding supporter of the Debtors by being a creditor that there's any good bankruptcy policy that is promoted by allowing Cyrus to get away with what it did here. I've given Your Honor different ways to skin the cat, if you will.

THE COURT: Well, let me --

MR. KIRPALANI: There is relief --

THE COURT: Originally when this motion was brought on, it was brought on on very short notice and then that was extended because the time pressure was off to some extent. But at least with regard to Sears Re is concerned, you're basically looking to undo that sale so that there can be another auction and my question is, is there even time to -- is there time to do that before the ISDA auction.

MR. KIRPALANI: So let me tell you what I know and as I mentioned, my partner is an expert in the CDS spaces here. If I make a mistake, he'll correct me. Mr. Hansen's also here who's much more experienced in this area than I am, too, on behalf of Och-Ziff.

But my understanding is that the CDS auction is actually going to take place in January so yes, there's time, and in terms of unwinding the sale, no. with respect to the Sears Re MTNs, and this is why I started with it. In terms of least disruption to rectify a wrong, the Sears Re bonds were never sold. All that has happened is the Debtors' contractually shackled themselves to prevent their --

THE COURT: Well, I mean, no. I --

MR. KIRPALANI: --subsidiary from selling.

THE COURT: No. I could. If the ISDA auction were to take place --

MR. KIRPALANI: It's in January.

THE COURT: -- tomorrow, I could elicit testimony or representations that the actual Swiss Re deal was a good deal for the Debtors and determine that in that context.

MR. KIRPALANI: Yes.

THE COURT: I could determine it even if the auction was to take place in January, so the fact that there wasn't Court approval of the forbearance or the caused Swiss Re to act a certain way, doesn't necessarily mean that I wouldn't approve it retroactively.

MR. KIRPALANI: That certainly would get the $60 million of value --

THE COURT: No, no. Not the $60 million, the deal that actually happened. But I mean, in a way, the $60 million point is a, I think, a red herring because you're basic -- you're making two points, but they both come down to the auction wasn't conducted fairly and if that's the case, I shouldn't -- I should have a do over. I shouldn't have, like, you and Och-Ziff say okay, well, then it devolves to us.

MR. KIRPALANI: I understand now what you're saying, Your Honor.

THE COURT: There should be -- instead, it should be done in a way where it's transparent and the notice is clear as to what can be bid on and the like.

MR. KIRPALANI: We'd welcome that opportunity,

too, Your Honor, and I do believe in terms of, the Debtors can address this themselves as I haven't seen it, but I do believe that there's no risk to the Debtors that by reopening the auction, they won't even get at least $82.5 million that Cyrus pays.

THE COURT: Well, it's not just $82.5 million. They're waiving claims, too.

MR. KIRPALANI: Waiving claims, Judge, but from an entity -- waiving recoveries from an entity that may not even distribute any value. So if that can be worked out between the Committee and the Debtors --

THE COURT: I don't know.

MR. KIRPALANI: I would think so.

THE COURT: They're not -- the Committee and the Debtors are not the ones waiving the claims --

MR. KIRPALANI: No, what I'm saying --

THE COURT: -- under the deal that was on the --

MR. KIRPALANI: What I'm saying is the following. Let's assume that SRAC pays its unsecured creditors 8 cents on the dollar. Let's just pick that number because I believe that's what SRAC debt trades at right now without this -- what I allege to be manipulation. It's 8 cents on the dollar. Obviously, receiving more than 8 cents on the dollar per bond is accretive if it is shared with SRAC for the benefit of its creditors and the seller. That's all I'm

saying.

THE COURT: Okay. All right.

MR. KIRPALANI: There's a way to work it out, to true it up.

THE COURT: Well, there's a way -- I don't know if there's a way to true it up, but there's definitely a way to evaluate the consideration that's on the table that came through Swiss Re.

MR. KIRPALANI: And to ensure that no third-party creditor is actually harmed, but actually everyone is benefited by it. Yes.

THE COURT: Okay.

MR. KIRPALANI: Thank you, Your Honor.

THE COURT: Why should I believe that there -- that if I opened it up and had a do over which included Swiss Re's ownership, potentially, that there would be a better deal?

MR. KIRPALANI: I believe the Debtors are in possession of a firm commitment from Barclays that has the assurance that they will pay their consortium of people who are interested in this, pay materially more than what Cyrus had paid. There's no --

THE COURT: For the whole Cyrus proposal or just the Cyrus portion?

MR. KIRPALANI: The --

THE COURT: Because I'm assuming if I opened it up, Cyrus would go back to square one.

MR. KIRPALANI: Let me see if I can answer this. The details of that consortium bid is confidential because until there is a new process, nobody wants to give Cyrus an advantage.

There are ways that the Debtors could take $82.5 million from Cyrus and there are ways they could take incremental more than $82 million from others. Whether Cyrus wants to -- I hear laughter from the back, so --

THE COURT: Yeah, I don't think Cyrus would agree to that.

MR. KIRPALANI: Whether Cyrus is interested in that deal --

THE COURT: Their whole point was that they locked everything up.

MR. KIRPALANI: That's their whole point and that's actually my point, too, Your Honor.

THE COURT: Okay. But if that value that they paid for locking up is better than what I would project the Debtors getting, even if the auction was screwed up, I'm not sure it matters.

MR. KIRPALANI: But that's what I'm trying to tell you, that that won't be the case. And we could -- I mean, we could do it this afternoon, but we could have a hearing

on that. But I have nothing further unless Your Honor has questions for me.

THE COURT: Okay.

MR. HANSEN: Good afternoon, Your Honor. Kris Hansen on behalf of Och-Ziff with Stroock & Stroock & Lavan. It's good to see you again.

I'll try not to be too repetitive of Mr. Kirpalani's presentation. I just wanted to point out a couple of things.

You cited it correctly. The motion seeking authorization said it would be a fair, transparent and competitive process and I think the briefs all demonstrate that there was some lack of transparency for sure and that lack of transparency resulted in what we believe is a not competitive process. And ironically, Cyrus was -- when they were --

THE COURT: Is it -- let me see if I can summarize your argument. I think it's Omega's argument, too. Your clients took the view based on the notice that the auction would be run by Jefferies, would be only for $245 million of Debtor MTNs. And your client formulated its strategy not just for bidding on those 245, but also for bidding on other MTNs that either the Debtors or Sears Re owned, and assuming that you'd be able to bid on them in the future. Anything above 245 or anything at all owned by Swiss Re. Is that how

you say it was -- the auction was not fair?

MR. HANSEN: Yeah. You're right, Your Honor. The primary basis of the argument is when you look at the notice that Jefferies sent out. So the Debtors said fair, transparent, competitive, and we're going to have Jefferies do the whole thing and they're going to handle the notice, they're going to take the bids in. We have an ultimate approval right.

So Jefferies sends out a notice that has as its subject line, Sears Series BMTN Auction, approximately $250 million, due today at 12 p.m. noon, see below.

You go below and it says, "Sears Holdings Corporation intends to conduct an auction on no more than $251 million." And then if you go down further in that actual notice, below the hyperlink that the Debtors cite, it actually lists three notes. You add the total of those three notes, it comes up to 251. So from Och-Ziff's perspective, yeah. Our way to proceed in this auction was, well, we'll take a shot at those 251.

We don't know if the Debtor is going to sell the other 650 at some point. We don't know. If they do, then we'll take a shot at those as well. But because of the way that the sale motion and the order was written, it says specifically they note in the motion that Sears Re, the foreign non-Debtor subsidiary, controls about $1.4 billion

in MTNs and they say these are not being included here. This is for the Debtors only.

And when you go to the order, it says Debtors only. So our perspective was even if we didn't have an opportunity to succeed in connection with the $251 million auction, we would at least have a fair shot to have a dialog with Sears Re. So the auction concludes. It's kind of murky, but there's market chatter about what the results were, only after Omega essentially forces the Debtor to put out the auction notice -- via discovery request -- gets them to put it out and lo and behold, the auction notice says, well, we didn't just sell 250, the Debtors actually went beyond --

THE COURT: No, I understand that, but I guess --

MR. HANSEN: -- and then Sears Re got locked up, too.

THE COURT: But --

MR. HANSEN: And, Your Honor, just to give you some --

THE COURT: No, but can I -- I'm trying to figure out whether there was any bidder that would actually have bid more, if they'd known what was actually for sale. All I'm hearing is that you might've bid on the other notes, but those weren't necessarily for sale, so I don't know how you wouldn't have put your best foot forward on the 245.

MR. HANSEN: But -- Judge, understood, but there's only one way to know the answer to that, which is to redo the auction.

THE COURT: No, but --

MR. HANSEN: You can't speculate and say I think a whole marketplace would've not reacted any differently if they thought $2.3 billion of MTNs were for sale as opposed to $251 million of MTNs. You can't --

THE COURT: I guess that's --

MR. HANSEN: And, by the way --

THE COURT: But it wasn't for sale.

MR. HANSEN: And -- but it got sold. That's the problem. They all got sold, and when the Debtors and Cyrus say, well, Sears Re didn't sell anything, that's not true. What was sold by the Debtors was a contractual right that prevented Sears Re from engaging with anybody. We reached out to Sears Re's counsel in Bermuda, made a proposal to them, and they responded we're not allowed to talk to you. And we said, who is. We've never heard back to this day.

So there's clearly an attempt to use the 363(m) protection which people had talked about in the responses to protect the process. But Cyrus' objection is quite telling. Before they resolved their objection through the insertion of that language in the order, their objection said most sale hearings, you get bidding procedures that get approved,

you get a winner, we come back, we approve them. So you can't do this because you're just going to release people to be trusted.

And we didn't have a problem with it because we said, sure, we trust the Debtors to run a fair process. The way they laid it out is Jefferies is going to sell these bonds. They'll give notice to the market. Market participants will react. And then after the fact, we found out they couldn't be trusted, because what happened was not what they told people would happen.

And so the result does not at all comport with the process that they laid out, so people can't hide behind 363(m) and say, hey, you preapproved it and we really can't be called to task for that no matter what the process was. And it's not -- so from our perspective, Cyrus was trying to be very smart in the way that they approached the process. So when we looked at it, we said the whole process is tainted. That's why you can't hide behind 363(m) protection.

THE COURT: Did your clients ask Jefferies before the auction whether there were any more Sears MTNs for sale than the 251?

MR. HANSEN: I don't know the answer to it, Your Honor, but from my perspective and my conversations with the client, I think the answer is no because they had no reason

to. The auction notice said no more than 250. So we assumed no more than 250 meant no more than 250 until we found out that no more than 250 meant $2.3 billion.

THE COURT: Okay. Can I -- Mr. Kirpalani, can I ask the same question of you? Did they ask?

MR. KIRPALANI: No, Your Honor.

THE COURT: Okay. All right.

MR. HANSEN: So, Your Honor, again --

THE COURT: Can I ask, your client actually owned Sears debt before the auction?

MR. HANSEN: Yes, Your Honor.

THE COURT: Okay.

MR. HANSEN: And we still own Sears debt. And it's -- we own second lien claims.

THE COURT: And did -- and your client made bids at the auction -- a bid?

MR. HANSEN: We did. Yes, Your Honor. And again, that's why the only way to know what the right result would be is to have another auction and when we look at it, we say there are -- as Mr. Kirpalani pointed out, there are various ways to do it, but with respect to Sears --

THE COURT: But can I -- I'm going to take Mr. Kirpalani up on his remarks about motivations here. Both your client and his client want the price to be low, right, ultimately, notwithstanding that your client's a creditor of

Sears?

MR. HANSEN: It -- I mean, it depends, Your Honor, right? Because if it's low then obviously we get paid on the insurance that we have.

THE COURT: Right.

MR. HANSEN: But if the price rises and we have more deliverables then we get paid out on all of those and it all depends on the price we paid for those. So, like, the auction --

THE COURT: Well, you always want to buy low and sell high, and you have another motivation to have it be low here which is you have a third party that's guaranteed the difference. So why -- I mean, you want to open it up to bid more, but your bidding would be lower.

MR. HANSEN: We have -- well, Your Honor, you're saying I'm standing here only in front of you wearing my CDS purchaser had. I'm not. I'm wearing my CDS purchaser hat and Och-Ziff is also wearing its hat as a creditor in the estate, and we'd like to see more value come into the estate.

THE COURT: How much debt does it hold?

MR. HANSEN: It's like $44 million of second lien notes. And so I think it's around $44 million, second lien notes.

And Your Honor, the issue -- and those are issued

by Sears Holdings and guaranteed by SRAC, so obviously they're to the extent that SRAC has more assets to be able to pay off claims with that, it works to our benefit as well and it also inures the benefit of creditors junior to us if we get paid off elsewhere. And from Sears Re's perspective, as we pointed out in our pleadings, right, it's an insurer for the company and obviously I believe handles some of their workers' comp liability.

THE COURT: But did anyone bid at this auction that -- it's odd to me that Omega would've bid at this auction. I mean, unless it just wanted to get a low price, and then sell its notes higher, because it wants a lower price. Why's it even trying to bid?

MR. HANSEN: The CDS auction dynamic changes depending upon how the parties participate in it, but if the auction price rises higher than parties who have requested a physical settlement can put in their paper and get paid par on that, so it's effectively -- depending on where they bought it, it's a substitute for the insurance that you purchased.

Obviously if the auction clears lower, then the insurer who's the seller has to pay a higher price. So the dynamic isn't as simple as, like, buy low, sell high. I mean, that is one aspect of it, but it also deals with this context of -- or concept of deliverability.

But from the Debtors' perspective, again, we agreed with them. There is a temporary artificial market for these notes where they can benefit from them and the estate should benefit from them. But it's got to be a fair process, and --

THE COURT: But I guess --

MR. HANSEN: -- if they knew they had --

THE COURT: There are two guiding principles behind reopening an auction. One is to maximize the value of the estate, and the reason, generally speaking, people don't reopen auctions is because you don't want to create uncertainty over auctions, because if you do you don't maximize value of the estate anymore.

The other principle is to be fair in the conduct of the auction. But if the fairness that you're asking me to be driven by is simply to be fair to people that want the price to be lower, then I'm violating the first principle.

MR. HANSEN: No, but that's not -- Your Honor, that's not the motivation. The motivation is not to reopen the auction to drive the price of the MTNs down.

THE COURT: Why?

MR. HANSEN: Because the MTNs are a deliverable product in the auction. So as they get delivered into the auction, there -- it could take a while but I could explain the multiple phases of an auction and how pricing is set

within it, but there is, effectively, a bid and offer phase of the CDS auction if there is an open interest that's created by the seller who requests physical settlement in the CDS auction.

If they do request that, right, for the amount of CDS that they've sold -- make it up and use an example. If they've sold $100 million of CDS, they can go into the CDS auction in the first phase and say I would like to physically settle $100 million, which basically means I'll buy $100 million of bonds because it has to be opposite of the position they have.

And in the second phase of the auction, limit orders get placed and those limit orders can either be bids to buy or offers to sell. People sell into that open interest, if you will, and when that open interest gets filled at the highest price, maxing out at par for purposes of the auction, that's where your price gets set and then the CDS contracts say I pay out basically going off of wherever that price got set.

If there is a residual open interest to buy, because there are not enough deliverables to put in, the auction goes to par and it closes at 100 cents and the sellers have no obligation to pay and the buyers collect nothing from the insurance contract that they purchased. However, if that open interest gets filled by orders that

people have, bonds that they own, that say, look, I'll put in and I'll sell in this auction.

The price rises throughout the CDS auction, having no impact upon the Debtor's estate. This all takes place in the other world, as my kids would say, the upside down, right? It's like it's out there somewhere. And so that process by which you put in bonds and deliver, some people will start out and say well, I'll put them in at 25 cents because I paid 20 for them. But it can rise and candidly, Your Honor, it can go all the way up to par and some people can even put in if the open interest isn't filled, above par and the party that requested the open interest in the beginning, like that put in the physical settlement request on the sale side has to buy them. That's how the auction works.

So it's not that the bidders here are all saying we want to reopen the auction so we can drive the price of the MTNs down. We all want to bid for them. By the way, I would love to hear Cyrus come back up here and say if you reopened the auction, we're going to lower our bid. We know what they bid, so obviously there's some price discovery that's already been taken place, but it shouldn't be thought of as a bad thing for them because we think that they and the Debtors kind of had a bad auction, if you will.

So from our perspective, we want the auction to be

transparent. We want it to be competitive and we want it to be fair. It wasn't any of those three things. And when you look at Sears Re, which is another hugs slug of potentially deliverable obligations, right, in connection with the auction, Sears Re is a non-Debtor. They're not covered by any of these orders. And the Debtors said, yeah, you're right. They're not covered. And they're free to transact after the auction is over.

Those statements themselves make no sense, because what they show you is that the Debtors themselves entered into an agreement to prevent Sears Re from being able to sell its bonds until after the auction closed. That standing alone, on its own, is outside of what you ordered. That can't be something that continues, because it essentially just blocked a whole category of value. And so now, if there are much more from a deliverable perspective --

THE COURT: Well, that's what you're assuming, and I've been probing to see whether that's true, that it blocks a whole category of value.

MR. HANSEN: The Sears Re bonds are deliverable into -- the bonds held by Sears Re are deliverable into the auction, so they have inherent value based upon that deliverability.

THE COURT: Right. But there's a price that Cyrus

paid for preventing that.

MR. HANSEN: Well, but the Debtor sold them something that they didn't have the right to sell them.

THE COURT: That's a separate point. I can authorize them to do it, but I'm trying to figure out whether that would make sense.

MR. HANSEN: But there's only one way to find out if it makes sense and that's to have a fair --

THE COURT: No.

MR. HANSEN: -- transparent auction.

THE COURT: Not really. I think people would -- maybe could give me answer on that. I've heard you on that. I've heard your explanation on it.

MR. HANSEN: Absolutely, Your Honor. I don't really have anything else. I just -- I wanted to make sure that I added those points.

THE COURT: Okay.

MR. HANSEN: Thank you, Your Honor.

MR. KIRPALANI: I just want to clarify one thing. Judge, for the record, Susheel Kirpalani from Omega. So I just want to make something very, very clear. Of course, my mom wanted to pay as little as possible for the Cabbage Patch doll, too. But when you need something and you want something, you'll pay whatever you've got to pay in competition.

My client bid 40 cents on the dollar per bond. That compares with 10 cents on the dollar per bond that Cyrus ultimately won the auction with. I understand what Your Honor's going to say, which is, but your client didn't bid for all $880 million. I get that. So what has happened is -- that's what I was referring to earlier.

Barclay's has amassed a consortium of people who want to buy in camera -- I wish Kramer Levin were here, because they represent Barclays, but in camera, we're happy to reveal to the Court and give the Court comfort that this offer is materially higher in the aggregate without diluting with additional claims any more than the $251 million that was agreed to. It's apples to apples higher. I'm not playing games here, Your Honor.

THE COURT: All right. And why did your client have to bid?

MR. KIRPALANI: Well, Your Honor, our client has bought protection on a certain number of bonds, we need to deliver -- if Cyrus, the seller of the protection says we're not paying on this insurance unless you show me the bonds, right, so we need to have those bonds in order to show them. That's what makes them valuable, right?

THE COURT: But all things being equal, you'd rather pay less than more for those?

MR. KIRPALANI: All things being equal, sure. But

we also live in the real world.

THE COURT: And the Cyrus would pay more, so -- but if it pays more, I'm not -- I guess it pays then and not later, each way.

MR. KIRPALANI: Yes. Yes.

THE COURT: Okay.

MR. KIRPALANI: Thank you, Your Honor.

THE COURT: All right.

MS. MARCUS: Good afternoon, Your Honor. Jacqueline Marcus, Weil, Gotschal, and Manges on behalf of Sears Holding Corporation and its affiliated Debtors. You're read a lot in the papers. You've heard a lot this morning about what Omega and Och-Ziff believe was wrong with the auction process. But you haven't heard them refute several incontrovertible facts.

Fact one, and this is one that I feel very passionate about, so pardon me. At the November 15th hearing, when I advised the Court that, "the $1.4 billion owned by Sears Re is not part of this," that was at the transcript at 96, there was no inkling that there would be a proposed transaction with Cyrus, let alone one that would restrict the sale of the Sears Re MTNs.

The statement to the Court was true and Omega's repeated allegations about misrepresentations made to the Court are flat out wrong and frankly insulting. I, too, had

very famous mentors and they taught me never to misrepresent to the Court.

Fact two, the order approving the sale of the MTNs owned by the Debtors did not limit the amount of the MTNs that the Debtors were authorized to sell.

Fact three, both Omega and Och-Ziff participated in the auction. Omega bid 40 cents for $70 million of MTNs, conditioned upon a decision by the ISDA determination committee that the MTNs would be final -- on the final deliverables list. Och-ziff bid between 9 and 25 percent for $14 million of MTNs, but provided that the offer would be automatically canceled if prior to the conclusion of the auction ISDA made a determination that the MTNs were not deliverable. On the day of the auction, bidders other than Cyrus did not even offer to buy the $251 million of MTNs that were identified in the Jefferies notice.

Fact four, on the day of the auction, the Debtors consulted with advisors to the Creditors' Committee regarding the offers that were received.

Fact five, the offer made by Cyrus of $82.5 million plus waiver of collections on approximately $630 million was the highest offer in terms of absolute dollars that was available on that day and that was not contingent.

Fact six, the Debtors have not sold any of the MTNs held by Sears Re. Sears Re still holds $1.4 billion of

MTNs.

Fact seven, Sears --

THE COURT: But the Debtors have both agreed and also have the power to deliver on that agreement to cause Sears Re not to sell.

MS. MARCUS: That's correct, Your Honor.

THE COURT: Okay.

MS. MARCUS: The Debtors as many Debtors who have non-Debtor subsidiaries act in their capacity as board members and owners and have some -- call it lower seat control over the acts of their subsidiaries. We did include, by the way, in the note purchase agreement provisions for dealing with the fact that Sears Re itself might ultimately become the subject of a proceeding in Bermuda, and obviously we couldn't fine them in those circumstances.

Fact eight, on the afternoon of November 20th, the ISDA determination committee made its determination that the MTNs are deliverable in connection with the ISDA auction.

And fact nine is the sale of the approximately $880 million of the MTNs owned by the Debtors closed on November 28th.

Omega's motion is nothing more than a classic attempt by a losing bidder to attack a sale process, when it underestimated how much it would have to pay to be the

winner. But the integrity of the bankruptcy sale process in this case and others would be undermined if Omega's motion were granted.

An example of that is this morning at 9:37 a.m. we did receive an email from Barclays indicating that they are offering to purchase the MTNs. They wouldn't tell us the price, but that offer expires at 5 p.m. this afternoon.

Importantly, Judge, in evaluating what occurred on November 20th, the Court must put itself into the position that the Debtors were in on that date, and not engage in the 20/20 hindsight that Omega's approach entails. On that date, there was uncertainty regarding whether the MTNs would qualify for the ISDA auction. That uncertainty was as a result of numerous characteristics of the MTNs including the fact that they were intercompany obligations.

And as an aside, Your Honor, the language that was added into the order on that day that I read into the record was really, I would say, almost invited by self at the November 15th hearing because the one part of Cyrus' then objection to the sale motion that I found somewhat convincing, frankly, was the fact that we couldn't have a sale free and clear of SRAC's defenses as part of the 363 sale and in fact, I had offered to clarify that as Your Honor indicated. It's black-letter law that you can't sell what you don't have, and that's where that language came

from.

On November 20th, other than the Cyrus bid, the Debtors received offers ranging from 15 cents to 40 cents for up to $177 million in aggregate amount of MTNs and most of those bids were contingent.

On November 20th, a decision by the ISDA Determinations Committee was imminent and an adverse determination could've eliminated any prospect for recovery on the MTNs.

In short, on that day the Debtors and their advisors in consultation with the Creditors' Committee determined that the Cyrus bid was in the best interests of the Debtors' estates and that the additional conditions imposed by Cyrus were justified by the substantial incremental value of the Cyrus bid.

Omega is trying to persuade the Court that may be as much as $60 million available to the Court if the Court grants the release -- the relief requested. However, it ignores several important considerations. The Court cannot grant the relief requested -- and you alluded to this, Your Honor -- and permit the Debtors to keep the $82.5 million paid by Cyrus for the MTNs. At best, therefore, the relief sought would require the Debtors to forego the $82.5 million, bear the Jefferies' commission that it already paid on the MTN sale, and only get back $60 million if Omega buys

the $150 million of MTNs.

That makes no sense from the Debtors' perspective. And the proverbial egg cannot be unscrambled here. Even if the Court were inclined to require the parties to redo the auction, they can't. The Determinations Committee has already ruled on the deliverability of the MTNs and therefore the market dynamics have changed completely. It would be manifestly unfair to Cyrus which put its money on the line and agreed to a noncontingent arrangement to undo a consummated transaction.

Finally, Your Honor, both Omega and -- not finally, actually. Both Omega and Och-Ziff purport to speak on behalf of the Debtors' creditors, when we all know that they are participants in the credit default swaps regarding SRAC debt. They bet against the Debtors and therefore they're simply trying to protect their own parochial interests. Tellingly, the real representatives of the unsecured creditors in these cases, the Creditors' Committee, participated in the evaluation of the auction bids and opposes the relief requested by Omega.

I would like to respond to a couple of additional points, Your Honor, that were made earlier. First, Your Honor, in terms of the Jefferies notice, the Jefferies notice was not a Court mandated notice. It was the manner in which Jefferies as our broker expert determined to

publicize the sale.

I can't deny that the face of the notice said that they were selling $250 million of MTNs but I think one thing probably everyone in this courtroom can agree on is that the players in the CDS market are not shy. If anybody wanted more, they would have asked Jefferies or made a bid for more, as Cyrus, frankly, did. Nobody solicited Cyrus and asked them to bid on more; they simply did it because it frankly was in their best interest to do so.

The -- I talked a little bit earlier about the language in the sale order and how that came to be. I think it's also telling that notwithstanding the language in the sale order, the Determinations Committee did approve the MTNs as being deliverable in connection with the auction.

Your Honor asked whether there was any evidence that Cyrus' alleged activities chilled bidding or that the language, I think, in the proposed order chilled the bidding. There is no evidence. We received nine bids and they were on the low side and that's what led us to accept the Cyrus bid.

Somebody asked why Cyrus is willing to withdraw the objection. I think Cyrus is willing to withdraw the objection because it was very clear from Your Honor's reaction at the November 15th hearing that they were not likely to prevail and therefore they withdrew their

objection.

Omega's counsel referred to the concept of there's a moment in time that you can't recreate. I think that is actually very appropriate here and I don't think that the Court can now do something which recreates the situation as it existed on November 20th.

THE COURT: Well, can I cut through this? There are two points that are, I think, really worth seriously considering in the motion by Omega. The first is that the auction notice was misleading in that it pretty clearly says that $250, approximately million of bonds would be auctioned. The second point is that the Debtors did take an action to lock up the Sears Re MTNs without any separate Court approval.

On the first point, though, I had pressed pretty hard on the effect of that notice on bidders, and the caselaw is pretty clear that if you change the rules of an auction without telling the parties to the auction that you've changed them, you run the risk notwithstanding the strong policy going back to Gil-Burn of the finality of auction sales to have the auction reopened.

But here, it still is not clear to me that given the nature of the facts at the time opening up -- saying clearly during the auction, we've changed the rule. We're not selling $251, we're selling as many as we can and this

includes causing Sears Re to do what we tell them to do with respect to these bonds, that there would've been any different result. And you're saying to me, I think, that there wouldn't have been because the people bidding at the auction actually weren't bidding for more than $250. They were bidding for a lot less than 250.

MS. MARCUS: That's exactly right, Your Honor, and nobody -- I don't know what the respective positions of Omega and Och-Ziff are in the CDS, but it would only make economic sense for them to bid to the extent of their open positions on the credit default swaps, so they weren't bidding for 880. That wouldn't have made economic sense from their perspective.

THE COURT: So the second point is the Sears Re point and it's true that Sears Re is not a Debtor, but I think, clearly, the Debtor's making a decision to cause Sears Re in return for valuable consideration, to take an action could well be viewed as being out of the ordinary course.

The caselaw is not that well developed on that issue, but I think that's because most people sort of know it, sort of know when you exert that level of authority it is out of the ordinary course and when it is, and sometimes courts honor that type of analysis to actually maximize value, for example, where the entity that you're selling

can't go into bankruptcy but the shareholder can and so you run the auction through the shareholders causing the entity to be sold.

But just accept for the moment that -- without agreeing -- that it is out the ordinary course to have caused Swiss Re to -- I mean, Sears Re to do that. As I said, I fully believe I can retroactively authorize it, but that in essence gives you through Sears Re, a second look which is different than the auction point. It basically does give the Debtors a chance to have a do over on today's facts.

Why is it that the Debtors believe on today's facts sticking with the Cyrus deal is a good business decision? I understand that that would involve potentially undoing the Cyrus deal in whole. I don't think you could divide it into two pieces, but I think that's a separate issue than saying that the auction itself should be reopened because it was not conducted efficiently or fairly or whatever, which I'm leaning the Debtors' way on that issue. This is a separate issue.

MS. MARCUS: So you asked me -- I think you asked me not to debate whether or not it was ordinary course, so I won't.

THE COURT: Right.

MS. MARCUS: And I do believe and was very

involved for a period of two weeks with this -- do believe we ran a pristine process. From the Debtors' point of view, again to be frank with the Court, if somebody could guarantee that there would be more than $82.5 million plus whatever the value of the waiver of the claim were worth --

THE COURT: Right.

MS. MARCUS: -- and that there would be no damage to the Debtors' estate, it would be foolish of me to say that's not ultimately better for the Debtors.

THE COURT: Well, is that the facts today?

MS. MARCUS: I don't know that anybody's guaranteed us any amount of money. We have an email that we got at 9:37 this morning that doesn't even have a price.

THE COURT: Well, maybe since I don't have anything before me seeking approval of the Swiss -- of the Sears Re deal, maybe you should do a motion for that.

MS. MARCUS: May I make an oral motion to approve --

THE COURT: I'm not sure.

MS. MARCUS: Well, to the extent that it's necessary, I --

THE COURT: Well, I'm not sure you know. I mean, to be honest, I don't think that's been fully explored and I can see why you wouldn't. I fully understand why you would not have fully explored it until after this hearing.

MS. MARCUS: You asked me not to debate it so I won't. I really don't think --

THE COURT: No, I --

MS. MARCUS: -- that it was necessary --

THE COURT: I'm going to let you come back to the -- you can come back to the ordinary course point. You can come back to that.

MS. MARCUS: Right. But --

THE COURT: I'm just raising -- I wanted to know what the answer to that question was.

MS. MARCUS: My job is to get the most money for the estate, right?

THE COURT: Right.

MS. MARCUS: And with the least amount of risk.

THE COURT: Right.

MS. MARCUS: And so if it were real and it were in the bank, so to speak, it would be difficult for me to take a different position.

THE COURT: Okay, but we don't know that today.

MS. MARCUS: I don't know that today.

THE COURT: But on the other hand, I don't have a motion before me today either on that issue.

MS. MARCUS: That's correct. Your Honor, I would point out that Paragraph 10 of the order does say the Debtors can take all actions necessary to effectuate the

relief granted in the order.

THE COURT: I know, but the relief granted in the order is to authorize the sale of the Debtors' MTNs.

MS. MARCUS: That's correct, Your Honor.

MR. DUBLIN: Good afternoon, Your Honor.

THE COURT: I'm sorry -- I really, I was just asking that as a discrete hypothetical question. You're free to try to convince me that it was in the ordinary course and didn't need court approval.

MS. MARCUS: I thought you asked me not to.

THE COURT: No, I said -- just while I was asking that question. That's all. But you can tell me now why you think so.

MS. MARCUS: I think it was, because it was an action by the Debtor not wearing its Debtor hat, wearing its hat as a board member or officer of a non-Debtor entity and at least in my experience when you have non-Debtor subsidiaries, they just operate the way they always operate. Their assets don't -- you don't need Court approval to sell their assets. You don't need Court approval to do anything with respect to those entities, and therefore the Debtor -- don't call it the Debtor right now, call it --

THE COURT: The board members.

MS. MARCUS: The board member who said, okay, I agree to that, I think that's in the best interests of the

company.

THE COURT: But the agreement wasn't with the board members.

MS. MARCUS: But the board members were acting on behalf of the Debtors and the board members --

THE COURT: Well --

MS. MARCUS: -- were doing --

THE COURT: Yeah, they were.

MS. MARCUS: They were acting on behalf of the Debtors and the non-Debtors and in order to maximize the value when we added up the bids that were -- the non-buyers' bids --

THE COURT: That's a separate issue.

MS. MARCUS: Okay.

THE COURT: Again, I understand at the time, it made sense. The problem was whether there was permission to do it.

MS. MARCUS: But Sears -- right now, Your Honor, Sears Re, again, is not a Debtor here or in Bermuda and it is operating --

THE COURT: No, no, I -- look. It is -- I guess what a motion for approval would look like is for approval of Sears to cause Sears Re -- it's for that -- be more specific. It's for the approval of the provision in the agreement with Cyrus that Sears is bound by that deals with

the Sears Re point. So that would be the action and I think that -- I mean, I think Sears Re's board would then be free to decide what to do if I determine that Court approval of that contractual provision would be granted or denied, one way or the other. Sears Re's board would then have the ability to make the decision what to do with the notes.

MS. MARCUS: The issue that I have with that, Your Honor, is that it becomes a very slippery slope as to how a Debtor --

THE COURT: I agree.

MS. MARCUS: --- manages its non-Debtor --

THE COURT: I agree completely.

MS. MARCUS: -- affiliates.

THE COURT: But there is a contract here that is with Sears, not with the board members. I mean, that's why the caselaw in this area is so sparse. I think the Maine case that -- State of Maine case, that is, that Omega cites, for example, is kind of -- takes kind of 36,000-foot view of it.

But there are other times when -- well, I'll give you -- when I was in private practice, I represented the owner of the Baltimore Orioles. He would never put the Baltimore Orioles into bankruptcy, but his bankruptcy required the resolution of his ownership and so we sold his decision on selling the Orioles and Judge Blackshear set up

an auction and approved it. So, I mean -- anyway. I -- but I understand that's a close call --

MS. MARCUS: Well, we --

THE COURT: I understand. That's a close call, too. I appreciate that.

MS. MARCUS: We didn't think --

THE COURT: And I also appreciate that you deal with the facts that you have at the time.

MS. MARCUS: I mean, we didn't think Court approval was necessary. We still don't think it's necessary, and I would urge you to remember that the parties who are objecting have their own agenda here.

THE COURT: That's why I was trying to figure out whether this even makes sense as a business matter.

MS. MARCUS: That's correct, Your Honor. Thank you, Your Honor.

MR. DUBLIN: Good afternoon, Your Honor. Phil Dublin, Akin Gump, for the Committee. I'll be brief.

I just want to give Your Honor some color on how the Committee viewed this, the auction that took place on the 20th and when the Committee was evaluating the information that was provided by Jefferies and the Debtors to us at that time, the decision process that the committee went through to choose the Cyrus bid, and I'll also touch on the Sears Re issue because I have a difference of opinion

there based on the facts that were provided to us at the time.

So obviously, Your Honor, we were before you on the 19th of November when the sale order was entered and it was the Committee that insisted on language in the order that remained in the order with respect to the ability to go look back after the fact to see if anybody engaged in any inappropriate conduct.

THE COURT: Right.

MR. DUBLIN: So that order still stands and regardless what happens today or after, that still stands, so people will continue to have the opportunity to look at the facts. But we all knew on the 19th that Jefferies was going to conduct the auction on the 20th, and when the auction was going to be conducted on the 20th, there was no expectation that there would be any other auction of any other MTNs, whether by the Debtors or by any other party.

So nobody was assuming that there would be anything offered after the 20th by the Debtors or by Sears Re with respect to these notes, and we did consult with the Debtors with respect to how many notes should be put out there from the Debtors' side as to get the best price. Because the Committee was focused on multiple things. One, getting as much value as possible, but we were also focused on what's going to be the impact on SRAC at the end of the

day with the increased amount of claims that would be asserted there.

We have the true up mechanism included in the sale order, but again, that's a little uncertain as to ultimately what would happen with respect to the true up, so whatever competing interests that we were focused on and we didn't want a gazillion dollars' worth of MTNs to be sold. We wanted to have some sold, get cash into the company, we were focused on the wind-down account and administrating insolvency down the path, if that's what happens, but as much value as we can get, keeping in mind our competing interests.

So we ultimately got comfortable that somewhere between $200 and $300 million is probably the right number. And when we got on the phone after the auction was completed by Jefferies with counsel for the Debtors and Jefferies, we were given all the information with respect to every single bidder, what every bidder wanted to buy, and what contingencies were placed on those bids as to whether the MTNs were going to be accepted into the CDS auction or not. And the process we went through was let's ignore the conditions.

Let's assume as if the Determinations Committee had said the MTNs are in. Because we didn't know that fact at that point, but in order to try to look at the bids on an

apples to apples basis, the Cyrus bid on the one hand and everybody else on the other, what's the right outcome here?

And the Cyrus bid was higher than all of the other bids combined.

THE COURT: And didn't have the contingency.

MR. DUBLIN: With no contingencies. But importantly, we also looked at the fact that what was going to happen when Cyrus facially was going to buy all of the MTNs that were available from the Debtors, every single one that they own.

Yes, on its face, they bought all of them. But they were waiving their right to any recoveries, anything above the $251 that was put in the auction. So as far as we were looking at it, they weren't sold. They just retired so that there would be no recovery on those notes. There was no ability to sell those notes in the future.

THE COURT: Well, let me -- but if the facts that more than 250 were being sold, if all of them were being sold, was it your view that the other people who were bidding at the auction would've actually bid for them?

MR. DUBLIN: I think they would've bid less. Our concern was if there was more available on its face, people would've bit less because there was more supply; therefore, you pay generally when there's more supply. If there were a lot more Cabbage Patch kids out there --

THE COURT: Right.

MR. DUBLIN: -- people would be paying less for the Cabbage Patch kids.

THE COURT: But now -- but what I'm saying is I appreciate that point. The first -- the decision to put up 250, I understand that point. But once you know that Cyrus is buy all of them, was there any calculation of, well, now that we know this, should be put them all up and so make it clear to everyone else that Cyrus is buying all of them and at that point, you know, they might bid more?

MR. DUBLIN: So, again, from our perspective, we didn't look at it as if they were buying all of them. We looked at it as if they were only buying 251 because all of the rest were going to be effectively retired.

THE COURT: Well, I understand that.

MR. DUBLIN: so there was no --

THE COURT: I understand the effect of the claims, but in terms of the money that would be paid, since Cyrus is buying them all up. And there are other bonds out there besides these, right? There are other indicia --

MR. DUBLIN: There's the second lien debt, there's other debt that SRAC has that's available to participate in the CDS auction whenever in January that's going to take place.

THE COURT: And are there other bonds outside of

the Sears universe or is it just Sears?

MR. DUBLIN: I believe it's just Sears.

THE COURT: All right. So now that the -- I'm not asking you to accept this. I'm not necessarily saying I'm accepting it, but now that the rules of the auction changed, instead of selling 250 you're selling 800, assume for the moment that the other folks, if they knew that, would also waive the claim. Was there any thought given to, well, were they going to bit more than $82 million?

MR. DUBLIN: No, because they only wanted to buy 150 to begin with.

THE COURT: And what about the effect of Cyrus tying up all the other bonds? Would that change that calculus? Because ultimately, I think that's what this argument that is being made to me is, that if -- we assumed that they're saying -- we assumed that there would eventually be other Sears bonds or Sears Re bonds for sale.

I'm not assure that assumption is valid, because there's not -- in fact, the order actually says you have to come to Court to get approval if there's any put up for sale after the auction.

But be that as it may, that's what they're saying. And this changes that calculus. The Cyrus deal changed that calculus, but did that enter into the evaluation of whether to take the Cyrus deal and not explain it to other people

that there's more bonds for sale?

MR. DUBLIN: Yeah, I don't think it impacted the calculus at Mr. Kirpalani, Mr. Hansen may disagree with me, at the point in time when their clients were bidding because the CDS auction has now been pushed out further than anybody ever anticipated. We expected that the CDS auction was going to occur.

THE COURT: Right away.

MR. DUBLIN: Right away. So there wasn't going to be another opportunity.

THE COURT: And Jefferies didn't say -- did Jefferies say anything like, well now that they tied it up we can probably really squeeze the short sell -- the other side?

MR. DUBLIN: Not that I'm aware of. I don't know what Jefferies says.

THE COURT: Can I -- Ms. Marcus, did Jefferies give any advice on that?

MS. MARCUS: I don't think so, Your Honor. I mean, I think Jefferies' view was, they're getting $82.5 million, it's much, much, much more than everything else put together.

THE COURT: Even if -- they didn't talk about the effect of Cyrus tying up a lot more bonds?

MS. MARCUS: Nothing.

THE COURT: Okay.

MS. MARCUS: And frankly, Jefferies obviously didn't make the decision, the Debtors and the board --

THE COURT: Right, but, well, did Jefferies push for anything other than this, though? Did they push for telling the other parties that it should be opened up?

MS. MARCUS: No, Your Honor.

THE COURT: And that the amount increase from 250 you know, in a big, public way?

MS. MARCUS: No, Your Honor.

THE COURT: Okay.

MS. MARCUS: And in fact, as Mr. Dublin said, the 251, they did come up with the 251 number based on their expertise as to what was --

THE COURT: No, I'm not talking at the beginning, I'm talking after Cyrus made its bid.

MS. MARCUS: Then, no.

THE COURT: Okay.

MR. DUBLIN: So, Your Honor, separate and apart from the fact, also, is that the 151 that was bid on by the other parties wasn't apportioned conditionally, but again the Committee, we didn't look at it that way. We said, pretend that they're not conditional, so let's figure out what's the best overall bid here, and the Cyrus (indiscernible) that. With respect to Sears Re, that's a

little different. As, I think Mr. Kirpalani's partners will let you know, we're the ones that gave them the information as to who counsel was to Sears Re.

We weren't aware of the limitation that this issue that we're talking about, whether it's inside or outside of the ordinary course of business to do this limitation, but I don't think it ultimately at the end of the day would have changed our position because it was, again, our expectation that CDS auction was going to happen very shortly after the Debtor sold their notes and ultimately, there weren't going to be any more sold.

So, I think factually, but for the fact that the determination is going to be has continued to push out, when the CDS auction is, that changes that calculus as it relates to Sears Re.

THE COURT: Do you -- or, I didn't ask you this either, Ms. Marcus, do you have a -- when is that auction now going to happen?

MR. DUBLIN: I think it's in the second of January on that. But one other point that Mr. Hansen mentioned with respect to the competing interest of Och-Ziff as a creditor versus a CDS participant. I think we know that they're here today as a CDS participant, they're not here as a creditor.

The value that would come in from a sale of additional MTNs, that wouldn't go to SRAC, it wouldn't go to

Sears Holding Company. The ones that Cyrus bought, that value goes to the two protection companies that owned the MTNs, and then if Sears Re ultimately sold notes, those would go to -- the proceeds will go to Sears Re.

Ultimately, I don't know what obligations Sears Re has outside of certain inter-company obligations, so I'm not sure how much of that value actually comes back into the Debtors' estates.

There are issues being created, and we talked about some of them today with respect to cash management, where there are services being provided by certain Debtor entities covering Sears Re warranty obligations that would presumably provide value back into the estate on that front, but I don't know what other competing interests there are for Sears Re.

THE COURT: Yeah, I mean, I agree with that, but I think the Debtors are getting a certain amount of value from Cyrus for their agreement to cause Sears Re not to sell them. So, that's the -- that's what, potentially, one could have a second look at.

MR. DUBLIN: Understood.

THE COURT: Money that would come to the Debtors for being relieved of that agreement which, again, I think would also mean that the full value of the Cyrus deal would be off the table.

MR. DUBLIN: We have to assume that would be the fact.

THE COURT: Okay.

MR. DUBLIN: We did also receive the Barclays proposal with a blank as to what the dollar amount is, so we're not really sure what that amount would be and it expires at 5:00 today. So, that wouldn't even permit a process to go forward there.

THE COURT: Okay.

MR. DUBLIN: Thank you, Your Honor.

MR. KRELLER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KRELLER: Thomas Kreller of Milbank Tweed Hadley & McCloy on behalf of Cyrus Capital.

Your Honor, I'll try to be brief, obviously, there's been lengthy discussions on a variety of topics. Under the heading of you can never step in the same river twice, I think there's a fundamental underpinning here that's being missed, and maybe (indiscernible).

Your Honor, underlying the motion that Omega takes credit for instigating, was the premise that the Debtors have to sell these notes before the DC determination of whether they would be listed into the ISDA auction or not because if you waited until the determination was made, then -- and ISDA -- and the Determinations Committee decided not

to put them on the list, then the Debtors would have lost the opportunity to capture (indiscernible) premium as Omega calls it.

And so, that was the judgment that the Debtors had to make. We have a moment in time to make this sale and we don't know when the DC's going to come out, we don't know what they're going to do, and we risk losing whatever value we might get.

That was the status of the assets as they were being sold at the auction on the 20th. You have Omega, and you have Och-Ziff now telling you, we want to buy a different asset. We want to buy an asset that's now been put on the list. We weren't prepared to bid in unconditionally and take the risk that they wouldn't be put on the list. In fact, our bids were expressly conditional upon them being put on the list.

That bid, that conditional bid, is directly contrary to what the Debtors were trying to achieve in the auction, or what the Debtors had to achieve in the auction. The Debtors were looking to de-risk themselves of the Determinations Committee determination with respect to the MTNs.

Cyrus said, we'll take that risk. We're bidding, it's unconditional, here's the price, here's the terms, and guess what? If they don't go on the list, if the DC comes

down and says they're not on the list and they were never going to go into the ISDA auction, we just gave the Debtors $82 million. We took that risk. Omega wasn't willing to take that risk. Och-Ziff wasn't willing to take that risk.

THE COURT: Okay, I get all that. I get all that, but when you say to the auction, you're including something -- Cyrus made three different bids, gave the Debtor a menu.

MR. KRELLER: Correct.

THE COURT: And the third bid, which the Debtors accepted, included something that wasn't in the auction that I approved.

MR. KRELLER: I take issue with that, Your Honor. I think that what was in the auction was the Debtors were authorized to go out and sell the MTNs on whatever terms and conditions generated the highest or otherwise best value for the estate. And I actually think that's the way your order was. That is why I think Paragraph 10, which Ms. Marcus pointed you to, is actually -- has more utility than you gave it in your brief colloquy with her, because that paragraph says: "The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order."

Now, when you look at one of the components of relief that are granted in the Order in Paragraph 3, it says: "The Debtors are authorized, but not directed, in

consultation with the Creditors' Committee, to sell the MTNs to the party or parties that provide the highest or best offer, and to deposit all the net proceeds of the sales into the wind down account," et cetera.

The relief granted in 3, Your Honor, says the Debtors can go out and enter into a contract to sell the MTNs on the best terms they can get. That's exactly what they did.

THE COURT: Well...

MR. KRELLER: That's exactly what they did, Your Honor.

THE COURT: All right, but I don't think anyone --

MR. KRELLER: And Paragraph 10 authorizes --

THE COURT: -- I didn't -- I certainly did not contemplate I was approving the sale of Sears Re's MTNs or the blocking of the sale.

MR. KRELLER: They weren't -- you're -- it's the opposite of (indiscernible).

THE COURT: I know, but it's the same thing. I mean, by blocking the sale, it means that you bought them, in essence, because they can't go anywhere.

MR. KRELLER: That doesn't mean we bought them, Your Honor, we don't have them.

THE COURT: Well, it effectively does because no one else could have them.

MR. KRELLER: But Your Honor, what it also does is -- it prevents the SRAC estate from being diluted to the tune of those $1.3 billion dollars (indiscernible)

THE COURT: No, I understand -- I -- believe me, I get that. I just -- the other question that I have for you is, it's all well and good to have 363(m) protection but if what was sold was not authorized to be sold at all, does 363(m) protection really apply to it? I mean, wouldn't you want to have that clarified with a separate notice and opportunity to be heard on that issue?

MR. KRELLER: In terms of the scope of the good faith finding?

THE COURT: No, no, not the good faith, the approval of the Debtors' Agreement to cause Sears Re to not sell the property, not sell the notes. Wouldn't you want to have Court approval of that? I mean, it's going to be an issue hanging over the whole deal for the next two, three years, if someone wants to appeal it.

MR. KRELLER: Okay, I'm --

THE COURT: It's a close call. Why not just --

MR. KRELLER: It is a close call, Your Honor, but appeal what?

THE COURT: Appeal --

MR. KRELLER: The Sale Order is the final Order.

THE COURT: But --

MR. KRELLER: It's not appealable.

THE COURT: But it's -- the issue is what the Sale Order covers, and whether -- I mean, the Sale Order authorizes a sale, a transaction, and you've given me one interpretation that says that it authorizes, among other things, tying up the Sears Re notes. I can see an equally valid interpretation that says, no it doesn't cover that. It covers the sale of the Sears MTN notes and sending out the auction notice and all the other stuff related to that. And that's an issue that could easily go either way, and at least four judges could opine on that over the next two or three years.

Wouldn't it be better just to do a Notice of Presentment and see what happens on that for the next week, appreciating the time constraints that Mr. Dublin and Ms. Marcus have told me about the auction, that'd be the second week of January, and then you know?

MR. KRELLER: Your Honor, I feel pretty comfortable that we do know.

THE COURT: Well, okay.

MR. KRELLER: I also think things have happened in the meantime. Remember, too, we're not just talking about undoing an auction, right? Most of the cases, I think all of the cases that Omega cites to our cases where there was an auction, the understanding of the sale hearing where

people are trying to overturn the results were not --

THE COURT: No, look, I -- I know Mr. Kirpalani is going to want to stand up and say something more in response, but I am pretty convinced that under these facts you wouldn't undo the auction based on the notice or any of the chatter or, you know, any of that.

But I am, legitimately concerned, I believe, about the agreement to cause Sears Re not to sell any notes. I don't think I approve that. I really don't. I don't think that was in front of me.

MR. KRELLER: I hear you, Your Honor, I'm sorry. I was making a different point.

THE COURT: Okay.

MR. KRELLER: My point was the cases that Omega and Och-Ziff cites were cases where an auction got overturned. Here, the auction happened, the sale closed and --

THE COURT: I got that, but if -- let's put it differently. You and the Debtors could have closed the sale on $250 million of bonds without the Debtors ever having made this Motion, right? That's conceivable. Sometimes people do that.

I represented Lehman Brothers once where they actually bought a lot of securities, not realizing that they were owned by a bankrupt company, and they called me up

having a heart attack and I went down to Camden, New Jersey and we sat down with Judge Wismar, and she said, well, this is the best price anyway, right? And everyone said yes, and she said, okay. It's retroactively approved.

But, if it wasn't the best price, if it wasn't proper it's too bad. It's not authorized, and you're -- you know, that's the condition of when you do business with a bankrupt company. You need to get Court approval first.

So, the fact that it closed I don't think matters for that aspect of the motion. It does matter for the first aspect, I understand that point.

MR. KRELLER: Okay, and it matters for other aspects of the case too, Your Honor. And I just want to say this because we had the junior DIP up earlier.

THE COURT: Right.

MR. KRELLER: The $82.5 million dollars came in. Cyrus paid it, the Debtors took it, it went into the wind down reserve. It's sitting in the wind down reserve as the collateral of the senior DIP lenders and the junior DIP lenders. If that money comes out --

THE COURT: It would only come out if someone was going to pay $85 million. It's not going to come out unless the money's there.

MR. KRELLER: I don't know how the sequence would work, Your Honor, that you could keep Cyrus on the hook

while going out and re-auctioning the assets that they bought. Don't you have to undo that transaction first?

THE COURT: Wasn't that Cyrus's risk when it unlocked the Sears Re stuff? I mean, that's the risk they took.

MR. KRELLER: I don't think it -- I don't think so, Your Honor.

THE COURT: Why? Why not?

MR. KRELLER: Because they were paying the money to purchase the MTNs, not to purchase the Sears Re MTNs.

THE COURT: They were -- but that, I mean, it's very clearly laid out in the three-part offer. The third part is a higher price in order to get the Sears Re locked up. So, it just wasn't a gift, they bought it.

MR. KRELLER: Your Honor, the point I'm making is that there are bigger implications in the case by potentially undoing this transaction. I take your point on the notice and the authorization.

THE COURT: But why -- what are they, other than -- I mean, obviously, if the Cyrus deal is the best deal, then it would stand, and if it's not the best deal, it would have to be replaced by something that would make the estate better off, not worse off.

So, I have a hard time seeing how it has greater implications for the case. And we're talking about a week

here. It's not like there's a great deal of uncertainty. It's going to be -- it would be resolved before the CDS auction.

MR. SCHROCK: Your Honor, sorry to -- may I just ask a quick question along the line of thinking?

THE COURT: Yes.

MR. SCHROCK: Are you asking about the best price bid from the facts known right now or at the time? I'm just trying to understand how you were thinking about it.

THE COURT: Well, I am focusing on the best price now because of the feature in this proposal that has Sears Re.

MR. SCHROCK: Thank you.

THE COURT: Yes.

MR. KRELLER: Your Honor, just to be clear, the three options in the menu, they all require the Sears Re provisions.

THE COURT: Yeah.

MR. KRELLER: It wasn't just one of the levels of bids.

THE COURT: I know, but it was all the deal. They took the third one, but it was all integral to the proposal.

MR. KRELLER: It was.

THE COURT: So, I mean, this is ultimately a business decision when you come down to it, because we're

talking now about what's highest and best for something that I don't believe I actually approved beforehand. And, I could decide it now.

I don't want to decide it after the auction, the CDS auction, and I don't have a really strong sense as to what date that is and when Jefferies would have to -- well, Jefferies wouldn't have to do anything. I mean, basically, if someone wants to make a better proposal at this point, they would have to do it by the deadline that I would set for the motion. It couldn't be a blank proposal. It would have to be a firm, committed, no-contingencies proposal.

MR. KRELLER: And a proposal on the assets as they sit today, as opposed to where they sat on the 20th.

THE COURT: No, as they sit today, because I don't see how you can pull out -- the Sears Re was inextricable to all of the bids. You can't pull it out.

MR. KRELLER: No, you can't pull it out, Your Honor, but you're giving --

THE COURT: If you could pull it out -- how can you -- no, how could you --

MR. KRELLER: But you're giving other parties the ability to leverage post-facto off the DC determination.

THE COURT: I appreciate that, but at the same -- but at --

MR. KRELLER: It's a different asset. That's

unfair to my client.

THE COURT: But it isn't, because I didn't approve this deal. That's why it's not unfair. That's -- that was -- that's the problem. I didn't approve it.

MR. KRELLER: You approved the highest and best proposal, Your Honor.

THE COURT: Well --

MR. KRELLER: You did.

THE COURT: -- I don't think I did. I -- look, I don't believe that I approved a lock-up of Sears Re.

MR. KRELLER: Your Honor, I'm not going to spend any time slinging arrows with Mr. Kirpalani. He stood here and told you that Cyrus did this and Cyrus did that.

THE COURT: I don't think you need to. I don't -- that didn't move me.

MR. KRELLER: There's also no -- just for the record, Your Honor, there is no evidence in the record of that.

THE COURT: Well, look, there was an initial hearing that we had where it was pretty clear to me that your client wanted to blow this up, and it was also pretty clear to me that I think you understood that that wasn't going to happen. And that if, notwithstanding, what would be happening in Court, you tried to do it out of Court, there'd be consequences. And the order, as Mr. Dublin says,

preserves that. So, I don't think that's -- I don't -- I'm not prepared today to say anything negative about Cyrus' lack of good faith.

MR. KRELLER: Thank you, Your Honor. I appreciate that.

THE COURT: I don't think the record establishes that just because Cyrus tried to blow it up at one point, and then changed its mind, doesn't mean that when it changed its mind it was acting in bad faith.

MR. KRELLER: Well, Your Honor, we tried to blow it up while at the same time trying to refine --

THE COURT: You had a right to try to blow it up. There's no problem with that, I didn't have --

MR. KRELLER: And to try to refine the order to protect SRAC because we were an SRAC creditor.

THE COURT: Right, I agree with that.

MR. KRELLER: Thank you, Your Honor.

MR. KIRPALANI: You were right that I was going to come back, but I'm not going to take your time up. You've given us a lot of it and I really appreciate it.

I would say I was waiting for confirmation from Barclays, but they have given us authority -- if the Court feels it would be important to in camera with the Debtors and the Committee reveal what the value is in this other bid to help the business --

THE COURT: All I've been told is it's blank, so I'm not prepared to do that.

MR. KIRPALANI: It's not blank. No, blank was a misnomer. It's redacted because there's no confidentiality.

THE COURT: Well, I don't want to do that. I don't want to do that. I really --

MR. KIRPALANI: We're happy to tell you.

MR. HANSEN: (Indiscernible) a buyer today?

MR. KIRPALANI: I think that's obviously open to discussion. So, if you say we're going to reopen this auction after you learn and see that it's actually in your interest to do so we'll work with you.

THE COURT: Well, I -- I don't want to --

MR. KIRPALANI: That's all I wanted to say.

THE COURT: Okay.

MR. HANSEN: Your Honor, I'm sorry to -- Kramer Levin is on a listen only line. They represent Barclays, they just sent me an email. I didn't want to read it to the Court. It says, "We're on a listen only line and not in court. Barclays executable offer generates more than Cyrus' proceeds in excess of $100 million dollars. I have been authorized by Barclays to authorize you to make that statement." That came from Mr. (indiscernible).

THE COURT: Well, all right, that's -- it's easy to say, and I appreciate your saying it, but --

MR. HANSEN: They sent it to me. It's been an issue of dispute and the last thing I would say before I leave the podium is just so we're clear with respect to Och-Ziff, our CDS exposure is much smaller than our claim. Our CDS exposure is about a third of our claim.

THE COURT: No, I appreciate, but that cuts the other way too, because your guys only bid under $20 million dollars, so I don't see this auction going anywhere, if it was just your two clients bidding.

MR. HANSEN: I agree with that. Just there was a claim made that we're standing here only in our capacity as a CDS party, but it's not true.

THE COURT: Okay. All right. Well, I have a motion in front of me by Omega basically looking to unwind the transaction that was consummated after the conduct of an auction by the Debtors' financial advisor, Jefferies, of so-called MTNs that I addressed in an order dated November 19, 2018.

There was clear time pressure on the Debtors to have that auction take place, because it needed to precede two events. First, the determination by the -- well, I'll do it in a different order. One of those two events was an auction run of applicable or qualifying securities in connection with the fixing of this applicable CDS measuring point for this particular set of credit default swaps

pertaining to Sears.

Preceding that auction was a determination by the Committee ultimately responsible for that auction, that the MTNs would have been qualifying or would be qualifying securities for that auction. Again, the Debtors' auction through Jefferies had to precede both of those events, because the intrinsic value of the MTNs was nowhere close to the value they would have if they could be applicable securities for the CDS measuring auction.

And the Debtors obviously did not want to risk having those securities being excluded from the auction and consequently had to have their auction before the larger auction.

I authorized in the November 19 order the following in Paragraph 3: "The Debtors are authorized, but not directed, in consultation with the Creditors' Committee, to sell the MTNs to the party or parties that provide the highest or best offer and to deposit all net proceeds of the sales into the wind down account as provided in the DIP orders, as defined below, provided that such authorization to sell the MTNs shall terminate at the close of business one business day following the date of the auction, and any further authorization to sell any or all of the MTNs will be subject to Court approval."

In other words, my order did not actually

establish auction rules for the conduct of the auction that I authorized. I merely said that it would take place under the supervision or direction of Jefferies with the consultation -- in consultation with the Creditors' Committee and the Debtors.

The Omega motion contends that the auction that Jefferies ran was unfair and not transparent and, in fact, confusing, primarily because the notice of the auction, which is attached to a copy of its motion, states "Sears Holdings Corporation intends to conduct an auction of no more than 251,245,000 SRAC medium-term notes today at 12:00 PM EST. Bids must be firm until 4:00 PM EST. Anyone bidding must be a QIB and should submit bids sizes and any stipulations. Bids must be submitted by email. Partial bids will be allowed. Sears will evaluate all bids and select buyers based on the highest or best bid in its sole discretion and business judgment. The auction may continue from time to time. Sears reserves the right to sell all, part, or none of the notes, dependent upon price and stipulations."

I, of course, approved the sale of more than 251,245,000 MTNs, and, pursuant to my approval order, Sears was authorized to sell more, and in fact did sell considerably more MTNs to Cyrus, who was determined to have made the highest and best bid for the MTNs at the auction.

The objector and the joinder party contend that, although the order itself authorized the sale that occurred of the MTNs themselves, the auction itself was confusing, as I said, and not transparent and misleading in that one could easily read the language that I just quoted to mean that only 251,245,000 MTNs would be for sale.

The last sentence, reservation of rights to sell all, part, or none of the notes, dependent upon price and stipulations, can easily be read not as a reservation to sell more than 251 million of the notes, but simply saying that you would reserve the right to sell less.

There were other indications in the auction notice if you went to them, they were hyperlinked, that more could be sold, and of course, that’s consistent with the sale order.

There’s a strong policy under the Bankruptcy Code in favor of the finality of bankruptcy auctions, however, there’s a well-recognized exception to that policy where the auction itself had inherent flaws in it to the extent that the court reaches the conclusion that, in balancing out the reasons for the strong policy in favor of the finality of a bankruptcy auction, the fair conduct of the auction overcomes those policies.

It is only in that context, i.e. the fairness of the auction, that another bidder would have standing to even

raise this type of issue. Omega itself only became a Creditor of these Debtors after the auction, and therefore, lacks any other type of standing to pursue its Motion at this point. See, for example, Hirsch v. Qingdao Orien Commercial Equip. Co. Ltd., 2015 WL 1014352 at pages 7-9 (E.D.N.Y Mar. 6, 2015). See also, in re Technical Systems, Inc., 896 F.3d 382, 386 (5th Cir. 2008).

But as I said, the exception to that rule is where either the Purchaser's conduct or the conduct of the auction in essence change the rules of the auction and in that sense gave them the status of an aggrieved party.

The Second Circuit a long time ago addressed what it described as the difficult balancing act a Bankruptcy Court must perform when it conducts an auction of a Debtors' assets, stating that, "It walks a tightrope," this is a quote, "between, on the one hand providing for an orderly bidding process, recognizing the danger that absent such a fixed and fair process bidders may decline to participate in the auction, and on the other hand, retaining the liberty to respond to differing circumstances so as to obtain the greatest return for the bankrupt estate." That's in in re Financial News Network, Inc., 980 F.2d 165, 166 (2nd Cir. 1992).

The Seventh Circuit also addressed that concern in Corporate Assets, Inc. v. Paloian, 368 F.3d 761 (7th Cir.

2004).

Generally speaking, the exception to the finality requirement occurs when the facts strongly indicate fraud, mistake, or unfairness toward the frustrated party. See K. Roe Associates of West Islip, LLC., v. Colony Hill Associates, 111 F.3d 269, 274-6 (2nd Cir. 1997).

And again, I think, consistent with the Financial News Network case, one needs to look at the policy behind the rule in favor of the final nature of an auction process. And those are two-fold. One is that the estate needs to be maximized. That's a primary obligation of the Bankruptcy Court as well as, of course, the Debtor.

But the other is, the integrity of the bankruptcy process and the understanding that the maximization of value depends upon the reliability of the outcome of an auction so that bidders actually make their best bid and don't try to game the system by holding back and then seeing where everyone has gone, and then making a bid under changed circumstances.

The exception though, as laid out in the two Circuit Court cases I've cited, includes where the rules of the auction changed without disclosure to all of the auction parties as a factor to take into account, which occurred both in Paloian and Financial News Network.

However, this is, I believe, a case-by-case, fact-

based process again in light of the overall policy. And here, even though arguably the notice laid out one set of assets that were to be sold, namely 251,245,000 MTNs, in fact, far more MTNs were sold and it does not appear that that was disclosed to other parties.

On the other hand, the parties who are complaining about that lack of unfairness have made no contention that I believe is credible that they themselves would have bid differently at the auction than they actually bid, which was for a far smaller number of MTNs than the 251 million or that they would have made their bids firm, as Cyrus did, as opposed to conditioned on the subsequent determination by the CDS Auction Committee, that these notes would be included in the overall CDS auction.

So, it is hard for me to see how they were, in fact, aggrieved by the change. As best as I can tell, both from the pleadings and oral argument, their argument, or their rationale for why they were aggrieved by not knowing that more MTNs were for sale, or that Jefferies would have considered bids for more than $251 million of MTNs, is that they might then have not held their cash in reserve thinking that they might be able to buy MTNs subsequently, either from the Debtors or a non-Debtor entity, Sears Re.

There is no indication that any of those MTNs ever would be for sale, and in fact, the Sale Order as far as the

Debtors MTNs, made it clear the Debtors would have to come back and get separate Court approval.

So, I am quite skeptical about the rationale as to why the change in the rules or the arguable change in the rules of the auction as laid out by Jefferies in the notice would have meant anything to the objectors here or the Movant and the Joinder Party here.

It has also been contended by Omega that the existence of a potential cloud over SRAC's potential defenses that were preserved under my November 19th Order adversely affected the sale.

I think most importantly, the notice itself makes it clear that SRAC waived all those defenses as claims, offsets, et cetera, that were covered by the proviso in the November 19 Order.

Moreover, notwithstanding what traders potentially might have thought, notwithstanding the large size of this transaction or series of transactions, if they were going to be bidding for less than the full amount, the proviso in the order was simply black letter law consistent with the New York General Obligations Law and is, in essence, the same type of proviso that applies to the purchase of any note from the Obligor under the note -- I mean with respect to the Obligor under the note.

So, I don't believe that that cast any type of

cloud over the sale that would merit undoing the auction.

Of course, here, I don't really even have a record that I believe is admissible that would show that if I did undo the auction, there would be a different result, a better result. So, obviously, that consideration was front and center in in re Financial News Networks, and it's absent here. But that is a relatively minor point, because again, if one looks at the facts here, I do not believe that the auction was conducted in a way that, in fact, prejudiced the Movant or the Joinder Party.

I also believe that the evidence before me today does not justify a conclusion that Cyrus has failed to act in good faith, which is the statutory exception to 363(m) of the Bankruptcy Code.

Notwithstanding that fact, there is a proviso in the November 19th Order that preserves the rights that it preserves against any buyer covered by the Order, including, obviously, the winning buyer, Cyrus. It's in Paragraph 7 and it says: "Provided further that nothing contained in this Order shall waive any rights of the Debtors, the Creditors' Committee, or any other Party or governmental entity, to the extent it is determined that a Party engaged in inappropriate conduct with respect to the transactions contemplated by this Order."

But on the record before me, I do not believe that

the actions taken by Cyrus here, as detailed in the Motion, and in the other pleadings and on the record today, rise anywhere close to the level of a finding that they have not acted in good faith.

As held by the Second Circuit in Licensing by Paolo, Inc. v. Sinatra, in re Gucci 126 F.3d 380, 390 (2nd Cir. 1997), "A purchaser's good faith is lost by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." That, to me, has not been shown here. All of the foregoing solely deals with the first aspect of Omega's Motion, which attacks the auction itself, and, for the reasons I just stated, I will deny that aspect of the Motion.

There is a second aspect of the Motion, however, and it goes to an aspect of the Cyrus transaction, which I have not yet addressed. In addition to buying the Debtors' MTNs, under the Cyrus transaction, Cyrus required, and the Debtors agreed, that the Debtors would cause their subsidiary, Sears Re, to not sell any of its MTNs that it owned, and there were a lot of them, roughly $1.4 billion.

The Motion for approval of the sale of the MTNs did not explicitly address or seek approval of such an agreement by the Debtors. Omega, in its Motion, contends that that agreement was an action out of the ordinary course

by the Debtors that requires Bankruptcy Court approval for it to be binding. 363(b) of the Bankruptcy Code states: "The trustee, after notice in a hearing, may use, sell or lease, other than the ordinary course of business, property of the Estate, unless the sale or lease is consistent --" I'm sorry, leave it at that.

So, Congress required, in 363(b) that a Debtor-in-Possession, which here is the same as a trustee, has the power to use, sell or lease, other than in the ordinary course, property of the estate only after notice in a hearing and ultimately approval by the court.

The Debtors contend that their agreement to cause their subsidiary not to sell its MTNs is not covered by this section, arguing two things.

First, that it's not a use, sale or lease - the agreement, that is, and secondly, that it's not a use, sale, or lease of property of the estate. There is limited case law on this issue. The Motion cites, among other cases, in re Consolidated Auto Recyclers, Inc., 123 BR 130 at 140-43, (Bankr.D.Me.1991) where the Court granted retroactive authority under 105 and 363(b) to vote stock in a subsidiary to cause it to file a bankruptcy case, and in re Raytech Corp., 190 BR 149 at 150-53 (Bankr. D.Conn.) granting a Debtors' request under 363(b) to authorize the non-Debtor subsidiary's entry into an acquisition agreement that the

Debtor would cause to happen.

But, those are far from controlling opinions. In essence, the Debtor was asking for comfort orders in both cases. The issue before me is whether the Debtors' agreement with Cyrus was a sale of property or a use of property. In essence, the Debtors agreed, in their contract, to cause Cyrus's board members not to take a certain action. And one can see how that would not be a sale of property, but really, just simply a board decision.

On the other hand, Cyrus bargained to have that action memorialized in a contract that would be binding on Sears, as opposed to the board members which, to me, certainly looks, smells and feels like property. And it was part of a sale. It was a condition to a sale on each of Cyrus' bids, and not a severable condition.

Cyrus argues, and I think the Debtor would, perhaps, agree with this, that the Sale Order itself actually did provide authorization for the Debtors' agreement to cause Sears Re not to sell the MTNs that it owns by providing, in Paragraph 10, "The Debtors are authorized to take all actions necessary to effectuate the relief granted in this order."

The problem with that argument, although it's certainly a credible argument, is that the motion itself and the hearing on the motion came nowhere close to alerting

people, as 363(b) requires in providing for notice in the hearing, that notes owned by Sears Re would be sold or locked up which, in essence, is the equivalent of the sale because the purchaser of the lock-up is in essence tying up the notes basically reserved on that issue.

So, while the Debtors have contended to the contrary, and have sought to defeat the Motion by Omega on all grounds, I believe that there is a serious concern here that the sale, as a whole, since the Sears Re part of it is an integral part of it, was not authorized by the Court. As shown by the Consolidated Auto Recyclers case, and I believe this is consistent with my authority, I could retroactively approve that sale.

And if the facts were so exigent that I would need to make that determination today, I think I would approve it, but I don't believe they are, and this is part of the tightrope that the Second Circuit talks about in FNN. I am told that the CDS auction is now going to occur sometime in the second week of January.

I believe, therefore, that it is appropriate to require notice and the opportunity for a hearing on the aspect of the transaction that requires Sears to cause Sears Re not to sell the MTNs to be made, on a shortened basis because of the facts before me, namely the CDS auction being impending, and to evaluate the transaction on today’s facts,

or the facts pertaining at the time that I would have a hearing on that notice.

I recognize that that would -- because it's an integrated transaction, mean, if I determined that I wouldn't approve the Sears Re part of the transaction, that the Debtors would lose the entire benefit of the Cyrus deal. But, because they are so integrated, I believe that's the only course to take here.

And therefore, I will direct that the Debtors provide notice and an opportunity for a hearing on the Sears Re aspect of the deal, but that will include the whole deal, on seven days' notice and you should schedule a hearing promptly after Christmas on it. Any objections would be due within that seven days, so the hearing would probably be eight or nine days afterwards.

MS. MARCUS: (Indiscernible) do we count (indiscernible) this or count (indiscernible) after New Years? Just for clarification.

THE COURT: Well, let's see, today is the 20th, so you could do it on the 28th or 29th, is what I'm thinking, with objections due the 27th or -- I'm sorry, have the hearing on the 29th, objections due on the 28th.

MAN 1: (Indiscernible) is that day, Your Honor.

THE COURT: Well, that's not good.

(LAUGHTER IN THE COURTROOM)

THE COURT: All right. So, that would -- I mean, you would get this notice out tomorrow --

MR. SCHROCK: Yes, Your Honor.

THE COURT: So, I'm thinking maybe objections due the 30th?

MR. SCHROCK: Yeah, Your Honor, just to be clear in terms of what your (indiscernible) do you want us to file the -- just a notice of the sale, and the sale would be of --

THE COURT: Notice of Approval of the Cyrus sale.

MR. SCHROCK: Of the Cyrus sale, okay. And --

THE COURT: And it's clear, I've approved every aspect of the sale except the Sears Re aspect. I'm not reopening the auction, I'm not doing any of that, but in effect, I guess I am because of the Sears Re issue. I think objections would be due, I guess, the 30th.

MR. SCHROCK: And just to be clear, Judge, this -- the only thing the Debtors own, right, in terms of what we can auction off, is the right to prohibit, I guess, Sears Re --

THE COURT: That's right.

MR. SCHROCK: -- from selling more notes, or not prohibit, so somebody will have to --

THE COURT: That's right.

MR. SCHROCK: -- somebody will have to put a bid

on that right, not the notes themselves, I want to make sure this is clear.

THE COURT: No, it would be on that right, and it would have to be better than the Cyrus deal.

MR. SCHROCK: Right, but that's all we own, is the right to --

THE COURT: Absolutely, that's all that should be noticed.

MR. SCHROCK: They're going to be bidding --

THE COURT: The right under the contract.

MAN: Your Honor, how can that --?

THE COURT: Well, no, it would -- I'm sorry. It would be for the other stuff too, because we're assuming Cyrus, if outbid, would have to get back what it paid.

MR. SCHROCK: I understand, I'm just (indiscernible) as to the Sears Re portion --

THE COURT: Yes, that's all you're offering.

MR. SCHROCK: -- that's all we're offering --

THE COURT: But you're also offering all the other securities.

MR. SCHROCK: The other MTN notes.

THE COURT: Right, exactly, that the Debtors own.

MR. SCHROCK: Right.

THE COURT: And I'm compelling you to do this. This is not voluntary, I appreciate --

MR. SCHROCK: And we'll do it, Judge. No questions.

THE COURT: No, I mean, I don't fault you at all for resisting it.

MR. SCHROCK: We felt like -- honestly, Judge, I feel like we're in a Hobson's choice under the facts, but that's --

THE COURT: Well, that's -- and frankly, I'm that way too, but I believe given the notice of hearing requirement that that needs to be done. So, I hate scheduling a hearing on New Year's Eve day, but I don't have anything else scheduled for then, so we'll have it at 10:00.

MR. SCHROCK: Sounds like a party.

THE COURT: Not my idea of a party, but it's a --

MR. SCHROCK: Not my idea of a party.

THE COURT: Right.

MR. SCHROCK: Okay, so, if we file the notice for approval of that aspect of the sale --

THE COURT: Tomorrow.

MR. SCHROCK: -- given this is an integrated transaction, we can file it tomorrow --

THE COURT: Yes.

MR. SCHROCK: -- and we'll move it forward expeditiously. But I do want to make clear to the other buyers that it will -- the only thing the Debtor is going to

offer is what they own.

THE COURT: Correct, which is the right to --

MR. SCHROCK: The right to block --

THE COURT: Which is the ownership of the bonds that it -- that they own, and the right to block Sears Re under the -- it's the same terms as the contract.

MR. SCHROCK: Understood.

MR. KIRPALANI: Your Honor, Susheel Kirpalani from Quinn on behalf of Omega.

I just wanted to notify the Court that there's a lot of things happening today in the CDS market and it may well be that the auction for the CDS is going to be pushed out even further. We're happy with --

THE COURT: Well, I'm not going to take a risk of that.

MR. KIRPALANI: No, we're happy. I just want to let the Court know to the extent --

THE COURT: All right.

MR. KIRPALANI: -- that you were only coming to Court on the 31st to deal with this issue because you thought, and we told you when a hearing was -- when an auction was is what's --

THE COURT: Right, but that's the best information I have.

MR. KIRPALANI: I agree.

THE COURT: If -- you know, so -- and I'm not going to adjourn it. I'm just -- you know, everyone's focused on this, they should file whatever objection they should make, and if they're going to. So, just to be clear, the notice will say that the Court will review the entire Cyrus transaction solely for the reasons stated in my ruling and for no others and that parties should read that transaction to see what they're objecting to.

MR. SCHROCK: Right, so we'll --

THE COURT: Because the Debtors can't do anything more than is laid out in that transaction.

MR. SCHROCK: Right, and so, we're going to have to -- frankly we'll have to probably attach the terms of the agreement to the notice.

THE COURT: Right, that's fine, I mean, they've been filed.

MR. SCHROCK: Right.

THE COURT: But that's right.

MR. SCHROCK: And we'll -- and the objections, I suppose, will be in the form of competing bids.

THE COURT: Well, I -- it's probably going to be some party in interest who says these people have a competing bid that's fully funded and non-contingent and ready to go. I mean, the bidders won't be able to object. It's just --

MR. SCHROCK: Right, and if we were to act on this timeline, Your Honor, I suppose they would just -- you know, whenever somebody's submitting an objection, then they'll have to prove up that they actually have the money.

THE COURT: Well, yes, because I'm assuming Cyrus will get refunded.

MR. SCHROCK: Yes, that's the implication of your ruling, Judge.

THE COURT: Right. Right. Okay.

MS. MARCUS: Just for clarification one more time, in terms of timing, the hearing on the 31st, which will be fine, and objections due on Sunday the 30th?

MR. SCHROCK: What about Friday? (indiscernible) on Friday the 28th, Your Honor? Would that be acceptable?

THE COURT: That's fine.

MR. SCHROCK: Okay.

THE COURT: That's fine.

THE COURT: Oh, you're kidding. It's closed New Year's Eve? I don't think so. Well, you guys would know.

(LAUGHTER IN THE COURTROOM)

MR. SCHROCK: We could come back on the 2nd, Your Honor, I think that's still (indiscernible).

THE COURT: All right. Okay, that's fine. And then you can make objections due on the 31st.

MR. SCHROCK: The 31st.

THE COURT: Yeah. Just file them electronically. I'm always asking them when there's a holiday. Thank you.

MR. SCHROCK: I believe that's all I have for the matter on today.

THE COURT: Okay, thanks.

(Whereupon these proceedings were concluded at 2:49 PM)

# C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: December 24, 2018